2009

Trovon Donta Ross v. State of Utah : Brief of Appellee

Utah Court of Appeals

Case No. 20090894-SC

IN THE

UTAH SUPREME COURT

TROVON DONTA ROSS,
Petitioner/Appellant,

vs.

STATE OF UTAH,
Respondent/Appellee.

Brief of Appellee

Appeal from an order denying a petition for post-conviction relief challenging a conviction for aggravated murder, a capital felony, in the Second Judicial District Court, Davis County, the Honorable Rodney S. Page presiding

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STATEMENT OF JURISDICTION

Petitioner, Trovon Donta Ross, appeals the denial of his petition for relief under the Post-Conviction Remedies Act (PCRA) challenging his conviction for aggravated murder, a capital felony, in violation of UTAH CODE ANN. § 76-5-202. This Court has jurisdiction under UTAH CODE ANN. § 78A-3-102(3)(j) (West 2009).

STATEMENT OF THE ISSUES

This Court affirmed Ross's conviction in an appeal where new counsel represented him. Ross then sought post-conviction relief on claims that (1) his trial counsel was ineffective for failing to raise an extreme emotional distress defense and (2) his appellate counsel was ineffective for not raising this claim of trial counsel ineffectiveness. The State moved for summary judgment on both claims, arguing that the first claim was procedurally barred and that the second failed as a matter of law.

1. Did the post-conviction court correctly deny as procedurally barred Ross's claim of trial counsel ineffectiveness because he could have raised it on appeal?

2. Did the post-conviction court correctly conclude that Ross's claim of appellate counsel ineffectiveness failed as a matter of law?

Standard of review for issues 1 and 2. This Court will "'review an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law.'" *Gardner v. State*, 2010 UT 46, ¶ 55, 234 P.3d 1115 (quoting *Taylor v. State*, 2007 UT 12, ¶ 13, 156 P.3d 739). Likewise, this Court will "'review a district court's decision to grant summary judgment for correctness.'" *Allen v. Moyer*, 2011 UT 44, ¶ 5, 687 Utah Adv. Rep. 5 (quoting *City of Grantsville v. Redevelopment Agency*, 2010 UT 38, ¶ 8, 233 P.3d 461).

3. Did the post-conviction court abuse its discretion in denying Ross's motion for appointment of pro bono counsel under UTAH CODE ANN. § 78B-9-109?

Standard of review. This Court reviews the denial of a motion to appoint counsel under the PCRA for an abuse of discretion. *See Hutchings v. State*, 2003 UT 52, ¶ 20, 84 P.3d 1150 (recognizing that section 78-35a-109—the prior version

of section 78B-9-109—leaves the appointment of counsel "to the court's discretion").

STATUTES AND RULES

The following statutes and rules, reproduced in Addendum A, are relevant to this appeal:

UTAH CODE ANN. § 78B-9-106 (West Supp. 2011);
UTAH CODE ANN. § 78B-9-109 (West 2009);
Utah R. Civ. P. 56;
Utah R. Civ. P. 65C.

CASE AND FACT STATEMENT

The crimes

Early on a June morning in 2003, Ross knocked on the front door of the home of his ex-girlfriend, Annie Christensen. TR.433:40-41.[1] Ross carried a High Point .380 semi-automatic pistol hidden in his waistband. TR.433:44, 61. The gun had a full ammunition clip and a round in the chamber. TR.433:167-69. Christensen answered the door and let Ross in. TR.433:41. He waited in the front room while she went back to her bedroom and returned with James May, her current boyfriend. TR.433:41, 55–56.

Ross asked Christensen to tell May when she and Ross last had sex. TR.433:44, 59. He also told Christensen to tell May that she hated her father.

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[1] "TR" indicates the underlying criminal case record. "PCR" indicates the post-conviction case record.

TR.433:44, 59. When Christensen did not respond, Ross pulled out his gun and renewed his requests. TR.433:44, 61. Christensen still refused to answer and begged Ross to leave. TR.433:45, 60.

Ross turned to May and stated, "I can't let her hurt you like she hurt me." TR.433:46, 60–61. Ross pointed his gun at Christensen, grabbed her arm, and pushed her past May towards the bedroom. TR.433:46, 62.

May believed that his best hope to save himself and Christensen was to go for help. TR.433:47. As he went into the garage and got into his car he heard a gunshot. TR.433:47. He heard two more shots as he frantically tried to start his car. TR.433:47, 65. Looking up, May saw Ross in the doorway leading into the garage. TR. 433:48, 65.

Unable to start his car, May threw his keys, jumped out, and ran. TR.433:48, 65. Ross emptied his gun at May, firing six shots. TR.433:48, 65, 167-69. The second shot passed through May's right arm and into his chest, lodging just under the skin in front of his ribs. TR.433:48; 437:34. Bleeding profusely, May continued running, hopping fences and knocking on neighbors' doors in search of help. TR.433:48–49. He finally ended up in the middle of the street where he flagged down a driver who called the police. TR.433:50. When the police arrived minutes later, May told them that Christensen had been shot and directed them to her house. TR.433:50, 89–90, 111.

After killing Christensen and attempting to kill May, Ross called Christensen's father, Steven Christensen. TR.433:158. Ross told Steven, "I just shot and killed your daughter, Annie, and I'm on my way to your home to finish the job." TR.433:158.

Neighbors who heard the gunshots saw a white van speeding away from Christensen's home and called 911 to report the shots and the van's description. TR.433:73-74, 76, 80, 83-85. Several police officers on route to Christensen's home passed the van, turned around, and activated their lights and sirens. TR.433:120-21, 133-34. The van sped up and the officers chased it for several miles at speeds of up to eighty miles an hour. TR.433:124-27, 134-36.

During the chase, Ross threw his gun out the window. TR.433:122. A passing motorist recovered it and turned it over to police. TR.433:142-43, 146. Ross also called his boss, Richard Luna, during the chase. TR.437:22). He left the following message on Luna's voicemail: "I just shot Annie, and I'm sorry man. I just shot her and I've got cops on my butt right now. (inaudible) I'm going to kill myself. I'm sorry, Richard. I love you man. Bye." TR.423:1; 437:22, 25; State's Ex. 58. The police eventually cornered Ross in a residential cul-de-sac and, after a brief foot-chase, arrested him. TR.433:128-30, 137-38.

The medical examiner concluded that Ross first shot Christensen in the back of the head, causing her to collapse. TR.437:51-52. After she fell to the floor,

Ross shot her twice more at point blank range, once in the neck and once in the abdomen. TR.437:51-52, 70-71.

Police recovered nine spent bullet casings and five expended bullets. TR.433:176, 189, 195; 437:6-8, 38, 46. Ballistics testing determined that all of the spent casings and bullets were fired from Ross's gun. TR.437:66-67.

The criminal case

The State charged Ross with aggravated murder, attempted aggravated murder, and failure to obey an officer's signal to stop. TR.1-3. Ross conceded that he had murdered Christensen and attempted to murder May; he argued only that the jury should not convict him of aggravated murder because the two acts were separate criminal episodes. TR.434:13-14. Stephen R. McCaughey, and William Albright represented Ross at trial. TR.433:1; 434:1.

After the jury retired to deliberate, McCaughey asked to make a record regarding trial strategy. TR.434:20 (copies of the relevant transcript pages are included in Addendum B). With Ross present, McCaughey explained that he did not raise an extreme emotional distress defense "because of evidentiary problems as are known to Mr. Ross and myself" and as a matter of trial strategy. TR.434:20-21. McCaughey further explained that if a penalty phase were necessary, Ross would testify and that testimony would show "the reasonableness of that strategy." TR.434:21.

McCaughey explained that he and Ross had discussed this strategy "a lot, on numerous occasions." TR.434:21. Ross confirmed that he had discussed the strategy with his counsel and that he agreed with it. TR.21-22.

A jury convicted Ross of aggravated murder and all other charges. TR.341-43;434:22. Ross then agreed to waive his right to a jury in the penalty phase, in exchange for the State's recommendation that he be sentenced to life without parole on the aggravated murder conviction. TR.435:2, 9. The trial court agreed and sentenced Ross to concurrent prison terms of life without parole, five years to life, and zero to five years. TR.369-72; 435:21-22.

The direct appeal

Ms. Elizabeth Hunt represented Ross on direct appeal. TR.399, 419, 459; *State v. Ross*, 2007 UT 89, 174 P.3d 628 (a copy of this opinion is included in addendum C). Ross claimed on appeal that: (1) Utah's death penalty statute was unconstitutionally vague; (2) his aggravated murder and attempted aggravated murder convictions should merge; (3) the impaneling of an anonymous jury prejudiced him; and (4) the prosecutor committed misconduct. *Ross*, 2007 UT 89, ¶ 18. This Court rejected Ross's first, third, and fourth claims, but agreed that his attempted aggravated murder conviction should merge with his aggravated murder conviction. *Id.* ¶¶ 59, 67. This Court therefore affirmed the conviction

for aggravated murder and vacated the conviction for attempted aggravated murder. *Id.*

The post-conviction case

Ross, acting pro se, filed a timely petition for relief under the PCRA raising fifteen claims of trial counsel ineffectiveness. PCR.5-35, 68-71. Ross also filed a motion for the appointment of pro bono counsel. PCR.1-2. The post-conviction court reviewed the petition and found it to be deficient because it did not allege a sufficient factual basis to support the ineffective assistance claims and Ross included no supporting memorandum. PCR.70. Pursuant to rule 65C(g)(3) of the Utah Rules of Civil Procedure, the post-conviction court returned the petition to Ross and granted him leave to file an amended petition.[2] PCR.70.

Ross subsequently filed a fifty-two-page memorandum supporting his petition and asked the post-conviction court to reconsider his petition in light of the memorandum. PCR. 73-124, 243. The memorandum included further detail regarding Ross's claims of trial counsel ineffectiveness. PCR.85-122. Ross also added a claim that his appellate counsel was ineffective for failing to argue on appeal that trial counsel was ineffective for foregoing an extreme emotional distress defense. PCR.122. Ross also explained his relationship with

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[2] Rule 65C was amended in January 2010 and this subsection was redesignated as 65C(h)(3). Utah R. Civ. P. 65C(h)(3) (2011).

Christensen. PCR.74-80. Among other things, he acknowledged that he knew that Christensen was dating other men, including May. PCR. 75-77. He also acknowledged that "both were sexually active with other partners." PCR.78. Ross also filed a second motion for appointment of pro bono counsel. PCR.263.

The post-conviction court reviewed the petition and supporting memorandum for frivolousness pursuant to rule 65C(g) of the Utah Rules of Civil Procedure. PCR.255. The post-conviction court dismissed as frivolous all of Ross's claims with the exception of his "claims of ineffective assistance of trial and appellate counsel pertaining to the failure of counsel to raise the affirmative defense" of extreme emotional distress. PCR.255. The court ordered the State to respond to these two remaining claims. PCR.257. The post-conviction court denied Ross's motions for appointment of pro bono counsel as premature. PCR.265-66 (a copy of this order is included in Addendum F).[3]

The State responded to the petition by moving for summary judgment on both of Ross's claims. PCR.287-305. Ross opposed the State's motion. PCR.335-41. He also filed a motion for default judgment, arguing that the State's response was untimely filed. PCR.344-46. He never renewed his motion to appoint counsel.

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[3] The record contains two consecutive pages numbered R.265.

The post-conviction court granted the State's summary judgment motion and denied Ross's motion for a default judgment. PCR.353-66 (a copy of the post-conviction court's order is attached as Addendum D). Ross timely appeals. PCR.369.

SUMMARY OF ARGUMENT

I. The post-conviction court correctly denied as procedurally barred Ross's claim that his trial counsel was ineffective for failing to assert an extreme emotional distress defense. The PCRA bars a petitioner from obtaining relief on any claim that he could have raised on direct appeal. Ross could have raised this claim in his direct appeal because he was represented by new counsel and had the means to assure an adequate record for appellate review. In fact, Ross admits that he could have raised this claim on direct appeal. Therefore, the post-conviction court correctly denied the claim as procedurally barred.

II. The post-conviction court correctly concluded that Ross's claim that appellate counsel was ineffective for failing to raise his claim of trial counsel ineffectiveness failed as a matter of law. Ross did not proffer evidence that, if proven, would have demonstrated that the claim was obvious from the record and would have likely succeeded on appeal. Ross failed to show that the claim was obvious from the record because the record contained trial counsels' explanation that, although they recognized the evidence could support an

extreme emotional distress defense, they made a strategic decision not to raise the defense based on extra-record facts known only to counsel and Ross. This was not a case where counsel overlooked an obvious defense.

Ross also failed to show that the claim likely would have succeeded on appeal. Ross first argues that he met this standard because, although counsel explained that they strategically chose not to raise the defense, they never fully explained their reasoning. Because, according to Ross, the record did not establish that trial counsels' strategic decision actually was reasonable, and because the evidence would have supported the defense, Ross argues that the post-conviction court erroneously concluded that an appellate claim of trial counsel ineffectiveness would not have likely succeeded. However, this argument ignores the fact that Ross bore the burden of demonstrating ineffectiveness. It also ignores the fact that his trial counsels' decision was presumptively reasonable.

To show that his appellate counsel could have likely succeeded on this claim, Ross bore the burden of proffering evidence that would show how appellate counsel could have overcome the strong presumption that his trial counsel performed effectively. Therefore, Ross had to allege the reasons that his trial counsel chose not to raise the defense even though the evidence supported

it, and then explain why those reasons were inadequate. Because he did not, his claim failed as a matter of law.

Alternatively, Ross argues that he overcame the presumption that his counsels' decision to forego the defense was reasonable because the evidence in his case would have supported the defense. But the fact that the record evidence supported his defense was insufficient to rebut the presumption of reasonableness where counsel recognized that the record evidence would have supported the defense, yet still made a strategic decision not to raise it because of evidentiary problems known only to counsel and Ross. Because Ross never alleged why his counsels' strategy was unreasonable, the post-conviction court correctly denied his claim.

III. The post-conviction court did not abuse its discretion in denying Ross's motions for appointment of pro bono counsel as premature. Ross filed the motions before the State had responded to his claims. The post-conviction court had dismissed as frivolous all but two of Ross's claims. The true complexity of those remaining claims and the need for an evidentiary hearing was not clear where the State had not yet responded. Moreover, Ross's filings to that point demonstrated his ability to proceed on his own. Therefore, the post-conviction court did not abuse its discretion in denying the motions as premature.

Ross did not renew his motion for counsel after receiving the State's motion for summary judgment although the post-conviction court had expressly granted him leave to do so. Instead, he filed a pro se response. Therefore, Ross tacitly conceded that he did not need counsel's assistance to respond to the State's motion.

ARGUMENT

I. ROSS'S CLAIM OF TRIAL COUNSEL INEFFECTIVENESS IS PROCEDURALLY BARRED

Ross sought post-conviction relief on the ground that his trial counsel was ineffective for failing to raise an extreme emotional distress defense. PCR.8, 85-102. The State responded that it was entitled to summary judgment on this claim because the claim was procedurally barred where Ross could have raised it on direct appeal. PCR.301-02. The post-conviction court agreed. PCR.360-62 (Add. D).

Ross appears to argue that the post-conviction court erroneously found his claim to be procedurally barred. Br. Aplt. at 12-14. He contends that "the district court erroneously ruled that Mr. Ross was precluded from raising ineffective assistance of counsel under the Post-Conviction Remedies Act." Br. Aplt. at 12 (bolding and capitalization omitted). However, Ross never explains exactly how the post-conviction court erred in denying his claim of trial counsel ineffectiveness as procedurally barred. Br. Aplt. at 12-14. Rather, he admits that

"[b]ecause [he] was represented by different counsel on direct appeal, the issues could have been raised on direct appeal." *Id.* at 13. Ross's admission defeats any assertion that the post-conviction court erroneously found this claim to be procedurally barred.

A petitioner cannot obtain post-conviction relief on a claim that he could have raised on direct appeal because "'[a] petition for post-conviction relief 'is not a substitute for appellate review.'" *Kell v. State*, 2008 UT 62, ¶ 13, 194 P.3d 913 (quoting *Taylor v. State*, 2007 UT 12, ¶ 14, 156 P.3d 739). The PCRA bars a petitioner from proceeding on "any ground that . . . could have been but was not raised at trial or on appeal." UTAH CODE ANN. § 76B-9-106(1)(c) (West Supp. 2011).[4]

A defendant can raise in his direct appeal a claim of trial counsel ineffectiveness when (1) he is represented on appeal by new counsel, and (2) the appellate record is adequate. *See State v. Litherland*, 2000 UT 76, ¶ 12-17, 12 P.3d 92. The post-conviction court correctly found that both requirements were satisfied in Ross's case. First, Ross's appellate counsel, Ms. Elizabeth Hunt, did not represent Ross at trial. TR.433:1. Second, rule 23B, Utah Rules of Appellate Procedure, allowed Ross to ensure that the appellate record would be adequate

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[4] Although this section was amended in 2010, the amendments do not change the substance of the relevant provision; therefore, the State cites to the current version of the statute.

to adjudicate his claim. *See Litherland*, 2000 UT 76 at ¶ 14; Utah R. App. P. 23B(a) ("A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel").

Ross does not explain why he could not have raised on direct appeal his claim of trial counsel ineffectiveness. Rather, he admits that he could have done so. Br. Aplt. at 13. Therefore, Ross demonstrates no error in the post-conviction court's conclusion that his claim of trial counsel ineffectiveness was procedurally barred. *See* UTAH CODE ANN. § 78B-9-106(1)(c).

II. ROSS'S CLAIM OF APPELLATE COUNSEL INEFFECTIVE ASSISTANCE FAILS AS A MATTER OF LAW

Ross also sought post-conviction relief on a claim that his appellate counsel was ineffective for failing to raise on direct appeal his claim that trial counsel was ineffective for not asserting an extreme emotional distress defense. PCR.122. The post-conviction court agreed with the State that this claim failed as a matter of law. PCR.362-66 (Add. D). Ross demonstrates no error in that ruling.

To demonstrate that his appellate counsel "was ineffective for omitting a claim," Ross had to show that the "'issue [was] obvious from the trial record and . . . probably would have resulted in reversal on appeal.'" *Lafferty v. State*, 2007 UT 73, ¶ 39 175 P.3d 530 (quoting *Taylor v. State*, 2007 UT 12, ¶ 16, 156 P.3d 739) (alteration in original).

The post-conviction court found that Ross's challenge to trial counsel's decision not to raise an extreme emotional distress defense was not obvious from the trial record because that record demonstrated that (1) trial counsel had a strategic reason for not raising the defense and (2) Ross agreed with that strategy. PCR.363-65. Ross nevertheless argues that "[t]he numerous facts in the record suggesting [he] reacted to extreme emotional distress make it obvious that trial counsel could have and should have raised the affirmative defense." Br. Aplt. at 22. However, this is not a case where the record shows that trial counsel overlooked an obvious defense. Rather, trial counsel explained on the record that they recognized the possibility of raising the defense based on the facts of the case, but nevertheless made a conscious, strategic decision not to do so based on extra-record information. That strategic decision was presumptively reasonable. *See State v. Taylor*, 947 P.2d 681, 685 (Utah 1997) (recognizing the """strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance""")(quoting *State v. Templin*, 805 P.2d 182, 186-87 (Utah 1990)) (in turn quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Given this record, the post-conviction court correctly concluded that the claim of trial counsel ineffectiveness was not obvious.

The post-conviction court also concluded that the claim would not have likely resulted in reversal on appeal because Ross alleged no facts that appellate

counsel could have relied on to rebut the strong presumption that trial counsels' strategy was reasonable. PCR.365. Ross contends that a genuine issue of fact exists about the reasonableness of trial counsels' strategy because trial counsel failed to raise the defense even though there was evidence that tended to show that he acted under extreme emotional distress. Br. Aplt. at 16-22. Ross contends that trial counsel never fully explained their reasons for not raising the defense and no facts in the record demonstrate that trial counsel's strategy was, in fact, reasonable. Br. Aplt. at 25. Ross demonstrates no error in the post-conviction court's ruling because his argument ignores (1) that he had the burden of demonstrating ineffectiveness, and (2) that his counsels' strategic decision was presumptively reasonable.

Ross erroneously presumes that the State had the burden of demonstrating that trial counsels' strategic decision was in fact reasonable, and therefore an ineffectiveness claim would have likely been unsuccessful on appeal. Br. Aplt. at 25. He argues that the post-conviction court's grant of summary judgment was erroneous because "[t]he record contains no reasons for [trial counsel's] purported strategy, nor any analysis to support it." *Id.* He further asserts that "the post-conviction court cannot determine as a matter of law that a reasonable strategy existed when counsel did no more than state that he had a strategy." *Id.*

Ross's claim fails because he confuses which party bore the burden of proof below. The State did not have the burden of demonstrating that trial counsels' strategy was reasonable, and therefore an appellate claim of ineffectiveness would not have succeeded. Rather, as the petitioner, Ross bore the burden of demonstrating that his appellate counsel could have likely succeeded on this claim of trial counsel ineffectiveness. *See Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993) (recognizing that the petitioner "bears the burden of proving his claim of ineffective assistance of counsel"). To show that this claim would have likely succeeded on appeal, Ross had the burden of demonstrating that his appellate counsel could have likely shown that: (1) trial counsels' strategic decision not to raise the extreme emotional distress defense was objectively unreasonable and (2) there was a reasonable probability that the defense would have succeeded had trial counsel raised it. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 690, (1984); *Parsons v. Barnes*, 871 P.2d 516, 521 (Utah 1994). In so doing, Ross had the burden of showing how appellate counsel could have overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Taylor*, 947 P.2d at 685 (additional citations omitted).

Because trial counsels' strategic decision was presumptively reasonable, Ross could not satisfy his burden simply by alleging that the trial record did not

fully explain the reasoning behind his counsels' strategic decision. Rather, in responding to the State's summary judgment motion, Ross had to proffer facts that, if proven, would have rebutted the strong presumption that his trial counsel's decision was reasonable. However, he failed to do so. PCR.365. Therefore, the post-conviction court correctly granted the State summary judgment and denied this claim.

Alternatively, Ross argues that he alleged sufficient facts to create a genuine issue of fact regarding the reasonableness of his counsels' strategic decision because he alleged that the evidence in his case would have supported an extreme emotional distress defense. Br. Aplt. at 19-23. He asserts that "[t]he presence of such facts are sufficient to rebut any presumption [that] trial counsel's strategy" was reasonable. *Id.* at 23.

But the mere fact that there was some evidence to support an extreme emotional distress defense does not rebut the presumption that trial counsel acted reasonably in choosing not to raise that defense. Presumably anticipating this very claim of ineffectiveness, trial counsel made sure to explain on the record that they recognized that extreme emotional distress was a possible defense. TR.434:20-21. They further explained that they made a conscious and strategic decision not to raise that defense "because of evidentiary problems" that were

known only to Ross and counsel.[5] TR.434:20-21. Ross agreed with that strategy. TR.434:21-22. This strategic decision was presumptively reasonable. *See Taylor*, 947 P.2d at 685.

Ross could not overcome this presumption of reasonableness by merely arguing that the evidence could have supported the defense. Trial counsel explained that they recognized that the evidence supported the defense. They nevertheless made a strategic decision not to raise it based on "evidentiary problems" known to trial counsel and Ross that supported counsel's decision, and that have never been revealed. TR.434:21. In opposing the State's summary judgment motion, Ross had the burden to proffer evidence of what those evidentiary problems were in order to rebut the presumption that, based on that undisclosed information, counsel made a reasonable decision. Ross's allegations in his memorandum supporting his petition may provide some insight into what those evidentiary problems were. If Ross disclosed to his counsel that he and Christensen "were sexually active with other partners," PCR.78, that disclosure would have undercut an extreme emotional distress defense based on Ross finding Christensen with another man.

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[5] As explained in the case and fact statement, counsel did not go on to explain their reasoning on the record because they anticipated that reasoning to become clear when Ross testified at the penalty hearing. TR.434:21. Unfortunately, however, the penalty hearing became unnecessary when later negotiations lead to an agreed upon sentence of life without parole. TR.435:2, 9.

The post-conviction court correctly found that because "trial counsel's decision not to raise the affirmative defense was strategic, [Ross] must set forth facts and argument to rebut the strong presumption of effectiveness regarding this decision." PCR.365 (Add. D). Ross had to do more than show that counsel could have raised the defense. He had to allege facts that, if proven, would demonstrate why it was unreasonable not to raise the defense even though the evidence supported it.

Ross alleged no such facts below even though [he] discussed the issue with his defense counsel "a lot, on numerous occasions." TR.434:21. He did not explain what he understood to be the reasoning behind his defense counsels' decision. He provided no analysis why that decision was unreasonable. Nor did he explain why he agreed with that decision at trial, even though he now considers it unreasonable. Rather, he simply argued below—as he does in his appellate brief—that his trial counsel were ineffective for failing to raise the defense because there was evidence to support it. PCR.85-90; Br. Aplt. at 19-27. However, as explained, that allegation was insufficient on this record to rebut the presumption that trial counsels' strategic decision was reasonable.

Ross does point to one reference in his opposition to the State's summary judgment motion that, according to him, raised a genuine issue of fact as to the reasonableness of his counsels' strategy. Br. Aplt. at 28. He claims in his brief

that he alleged below that his trial counsel told him that they did not raise the extreme emotional distress defense because "he was of 'sound mind.'" *Id.* He argues that this allegation was sufficient to raise an issue of material fact "as to whether counsel misunderstood the law" and therefore made an unreasonable strategic decision "[b]ecause of soundness of mind is irrelevant to an extreme emotional distress affirmative defense." Br. Aplt. at 28-29.

However, this reference did not create an issue of material fact because it did not refer to Ross's explanation of the reasons that counsel did not raise a defense of extreme emotional distress. Rather, the statement that Ross was of "sound mind" refers to Ross's understanding of why counsel did not raise a defense claiming that he acted under a delusion attributable to mental illness. PCR.336-337 (a copy of Ross's opposition to the State's summary judgment motion is included as Addendum E).

Ross discussed a defense based on a delusion attributable to mental illness because he believed that the State had misinterpreted his petition to claim that his counsel was ineffective for failing to raise that defense, rather than his original claim regarding the omission of an extreme emotional distress defense. PCR.336-37. In his opposition to the State's summary judgment motion, Ross first referred to the portion of the criminal record on which the State relied—trial counsel's explanation that, because of "evidentiary problems" known only to

Ross and counsel, "[t]here was no manslaughter defense raised based on any extreme emotional disturbance." PCR.336. Ross then argued that "[t]he 'manslaughter defense' Respondents appear to be relying on is Utah Code 76-5-205[(]1[)](c), which refers to 76-5-205.5 and is defined there as 'a delusion attributable to a mental illness. . . .'" PCR.336-37.

Ross then explained that he was not claiming that his trial counsel were ineffective for failing to raise a defense based on a delusion attributable to a mental illness, but rather an extreme emotional distress defense. PCR.336. Apparently seeing a distinction between an emotional disturbance and an emotional distress defense, Ross explained:

> However, Respondents are completely off point here: manslaughter and its 'emotional *disturbance* defense' is not what was claimed, nor held by the order below, or Petitioner.[6]
>
> What was held to be the issue was 76-5-202-3-a-i, 'under the influence of extreme emotional *distress* for which there is a reasonable explanation or excuse.'

PCR.336(emphasis added). Thus, in his opposition to the State's summary judgment motion, Ross was using the phrase "extreme emotional disturbance" to

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[6] In referring to "the order below," Ross presumably means the post-conviction court's order requiring the State to respond to his claims (PCR.255-57).

refer to a defense that he acted under a delusion attributable to a mental illness, not an extreme emotional distress defense.[7]

Ross then explained that his counsel "did not raise a 'manslaughter defense based on any extreme emotional disturbance' because counsel had inferred that the mental evaluations were holding him of sound mind, and that the evidence of the case precluded raising that defense." PCR.336. Ross further explained that his defense counsel told him "the mental evaluations would not support" a delusion defense. PCR.337.

In their proper context, Ross's explanation that his trial counsel did not raise a manslaughter defense because he was "of sound mind" did not refer to counsels' reasons for not raising an extreme emotional distress defense. Rather, Ross was explaining why counsel did not raise a defense of delusion attributable

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[7] The phrases "extreme emotional disturbance" and "extreme emotional distress" do not refer to different defenses. When trial counsel referred to the defense as "extreme emotional disturbance" he was simply using an old statutory label for the extreme emotional distress defense. At the time of Ross's trial, the statute described the defense as one of "extreme emotional *distress*." *See* UTAH CODE ANN. § 76-5-202(3)(a)(i) (West 2004) ("It is an affirmative defense to a charge of aggravated murder . . . that the defendant caused the death of another . . . under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.") (emphasis added). However, statutes had earlier referred to the defense as one of "extreme emotional *disturbance*." *See* UTAH CODE ANN. § 76-5-202(1)(b) (1997) ("Criminal homicide constitutes manslaughter if the actor: . . . (b) causes the death of another under the influence of extreme emotional *disturbance* for which there is a reasonable explanation or excuse.") (emphasis added). Therefore, trial counsel was simply referring to the extreme emotional distress defense by its old statutory label.

to a mental illness. Therefore, contrary to Ross's contention in his brief, his explanation of his counsels' reasoning did not create a genuine issue of material fact regarding the reasonableness of counsels' decision not to raise an extreme emotional distress defense.

Ross alleged no facts explaining why his counsel unreasonably chose not to raise the extreme emotional distress defense. Therefore, the post-conviction court correctly found that Ross had failed to allege any basis on which appellate counsel could have overcome the presumption that trial counsel performed effectively in deciding not to raise an extreme emotional distress defense. PCR.365 (Add. D). Consequently, the post-conviction court correctly concluded that Ross's claim of appellate counsel ineffectiveness failed as a matter of law.

III. THE POST-CONVICTION COURT DID NOT ABUSE ITS DISCRETION IN DENYING ROSS'S MOTION FOR APPOINTMENT OF PRO BONO COUNSEL

Ross filed two motions for the appointment of pro bono counsel under UTAH CODE ANN. § 78B-9-109. PCR.1-2, 263. He filed the first motion with his petition and his second motion when he filed his supporting memorandum. PCR.1-2, 263. The post-conviction court denied Ross's motions as premature. PCR. 265-66 (Add. F). The post-conviction court reasoned that it was not clear whether Ross needed counsel when he filed his motions because the complexity of Ross's remaining claims and the need for an evidentiary hearing was

uncertain. *Id.* The court had dismissed the majority of Ross's claims as frivolous and the State had yet to respond to the remaining claims. *Id.*

Ross argues that "the post-conviction court abused its discretion in denying [his] requests for counsel because the petition involved complicated issues of law and fact." Br. Aplt. at 34 (bolding and capitalization omitted). On the contrary, the post-conviction court appropriately exercised its discretion because it was not clear that the case had become so complicated that it exceeded Ross's ability to proceed on his own. Moreover, Ross never renewed his motion after he received the State's summary judgment motion.

This Court "will find that a trial court has abused its discretion 'only if the trial court's decision was beyond the limits of reasonability.'" *State v. Arguelles*, 2003 UT 1, ¶ 101, 63 P.3d 731 (quoting *State v. Olsen*, 860 P.2d 332, 334 (Utah 1993)). Thus, "an abuse of discretion occurs if the trial court's actions are 'inherently unfair' or 'if [this Court] conclude[s] that no reasonable [person] would take the view adopted by the trial court.'" *Id.* (quoting *State v. Russell*, 791 P.2d 188, 192 (Utah 1990) & *State v. Schweitzer*, 943 P.2d 649, 651 (Utah Ct.App.1997)) (last alteration in original).

"[T]here is no statutory or constitutional right to counsel in a civil petition for post-convcition relief." *Hutchings v. State*, 2003 UT 52, ¶ 20, 84 P.3d 1150 (citing UTAH CODE ANN. § 78-35a-109 (1999) and *Pennsylvania v. Finley*, 481 U.S.

551, 555-56 (1987)). Nevertheless, the PCRA grants a post-conviction court discretion to appoint pro bono counsel to an indigent petitioner if the court concludes that the circumstances of the case merit such an appointment. UTAH CODE ANN. § 78B-9-109 (West 2009). The PCRA provides that "[i]f any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal." *Id.* § 78B-9-109(1). The PCRA also gives the court some guidance in determining when it is appropriate to appoint counsel. *See id.* at 78B-9-109(2). It states that "[i]n determining whether to appoint counsel, the court shall consider the following factors: (a) whether the petition or the appeal contains factual allegations that will require an evidentiary hearing; and (b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication."[8] *Id.*

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[8] Ross argues that this Court has interpreted this provision as requiring a post-conviction court to appoint counsel whenever either of the two considerations in subsection 78B-9-109(2) exist. Br. Aplt. at 34. For support, he quotes a sentence from *Ford v. State*, 2008 UT 66, ¶ 15, 199 P.3d 892, in which this Court explains the content of the PCRA's provision for appointing pro bono counsel. Br. Aplt. at 34 (quoting *Ford*, 2008 UT 66, ¶ 15). However, Ross reads too much into this sentence from *Ford*. The sentence does not interpret the PCRA and, in any event, is dicta.

This Court did not interpret section 78B-9-109 in *Ford*. The issue there was "whether defendants who succeed in vacating their convictions in a post-conviction relief proceeding are entitled to *paid* counsel to represent them during

The post-conviction court appropriately exercised its discretion in denying Ross's motions for appointment of pro bono counsel as premature. The true complexity of Ross's remaining claims and the need for an evidentiary hearing was uncertain where the State had not yet responded to the claims. Without the State's response it was unclear what defenses Ross would have to respond to and whether the claims could be summarily dismissed, or whether a hearing would be required. Therefore, the applicability of the section 78B-9-109(2) factors was unclear.

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the State's appeal." *Ford*, 2008 UT 66, ¶ 1 (emphasis added). This Court held that such defendants are "entitled to the assistance of paid counsel on appeal pursuant to he Indigent Defense Act, the Utah Constitution, and the United States Constitution." *Id.* at ¶ 14. In reaching this holding, the Court recognized that the PCRA's provision allowing for the appointment of pro bono counsel "does not conflict with the Indigent Defense Act." *Id.* at ¶ 15. The Court then explained the substance of the PCRA's provision, stating, "[t]he Act indicates such appointment should occur at the request of the petitioner, and where an evidentiary hearing would be required or the 'petition involves complicated issues of law or fact that required the assistance of counsel for proper adjudication.'" *Id.* (quoting § 78B-9-109(2)).

Ross relies on this Court's use of the word "should," to support his argument that this Court interpreted the PCRA to require the appointment of counsel whenever either requirement of the subsection was met. Br. Aplt. at 34. In context, however, the Court was simply repeating the statutory language, not interpreting it. *See Ford*, 2008 UT 66 at ¶ 15.

Even if this Court did interpret section 78b-9-109 in *Ford*, that interpretation is dicta because the issue in *Ford* did not involve appointment of pro bono counsel under the PCRA. *See Beaver County v. Home Indem. Co.*, 52 P.2d 435, 444-45 (Utah 1935) ("Obiter dicta is that part of an opinion which does not express any final conclusion on any legal question presented by the case for determination or any conclusion on any prin[c]iple of law which it is necessary to determine as basis for a final conclusion on one or more questions to be decided by the court.")

Nor was it apparent on the face of Ross's pleadings that his claims were so complex that he could not proceed on his own. As explained above, Ross simply had to allege why his trial counsel chose not to raise an extreme emotional distress defense, and then explain why that choice was unreasonable under the circumstances of his case. The facts supporting these allegations and analysis were within Ross's grasp and ability. He was privy to the discussions surrounding his counsels' decision. Ross and his counsel had "talked about [that decision] a lot, on numerous occasions." TR.434:21. Moreover, trial counsel believed that Ross's own testimony would demonstrate the reasonableness of this decision. TR.434:21. Therefore, the reasonableness of counsels' decision appears to have been based entirely on facts that Ross knew.

Ross's filings demonstrated that he had the ability to litigate his case on his own. Appellate counsel herself relies on what she characterizes as Ross's own "apt" articulation of his arguments below. Br. Aplt. at 29 (quoting PCR.115-16). Ross claims in his brief that "[d]iscovering errors in an attorney's representation is difficult, if not impossible for a non-lawyer." Br. Aplt. at 36. However, he was able to file a pro se petition alleging fifteen claims of ineffective assistance of counsel. PCR.68-71. Ross was also able to recognize the need to frame his surviving claim as one of ineffective assistance of appellate counsel to avoid the PCRA's procedural bar. PCR.122. Ross's memorandum supporting his post-

conviction petition spans fifty-two pages and includes attachments containing over one hundred pages of discovery from the criminal case. PCR.73-124, 125-241. In that memorandum, Ross provides a detailed statement of the facts of his case and a detailed discussion of the extreme emotional distress defense. PRC.73-91. Ross understood the facts of his case and how the defense could have applied. In short, the record confirms the post-conviction court's conclusion that Ross did not yet require pro bono counsel.

Moreover, the post-conviction court did not foreclose Ross from renewing his motion after the State had responded to his claims. Rather, it expressly granted Ross "leave to renew his motion to appoint counsel at the proper time in the proceedings." PCR.266. However, Ross never renewed his motion for counsel after receiving the State's motion for summary judgment. Rather, he filed his opposition pro se. Therefore, he implicitly conceded that he did not require the assistance of counsel to respond to the State's motion.

In sum, the applicability of the factors in section 78B-9-109(2) was unclear when Ross filed his motions for counsel and his filings to that point demonstrate that he could proceed on his own. Therefore, the post-conviction court's conclusion that the motions were premature was not objectively unreasonable. Accordingly, the post-conviction court did not abuse its discretion in denying Ross's motions. *See Arguelles*, 2003 UT 1, ¶ 101.

CONCLUSION

For the foregoing reasons, this Court should affirm the denial of the petition for post-conviction relief.

Respectfully submitted 29 August 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on 29 August 2011, two accurate copies of the foregoing brief were ☒ mailed ☐ hand-delivered to:

Sanna-Rae Taylor
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Salt Lake City, UT 84111

A digital copy of the brief was also included: ☐ Yes ☒ No

Lee Nakamura

Addenda

Addendum A

UTAH CODE ANN. § 78B-9-106 (West Supp. 2011) Preclusion of relief – Exception

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section 78B-9-107.

(2)(a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.

(b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

(4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).

Credits

Laws 2008, c. 3, § 1170, eff. Feb. 7, 2008; Laws 2008, c. 288, § 5, eff. May 5, 2008; Laws 2010, c. 48, § 1, eff. May 11, 2010.

UTAH CODE ANN. § 78B-9-109 (West 2009) Appointment of pro bono counsel

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition or the appeal contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

Credits

Laws 2008, c. 3, § 1173, eff. Feb. 7, 2008; Laws 2008, c. 288, § 8, eff. May 5, 2008.

Utah R. Civ. P. 56. SUMMARY JUDGMENT

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this

rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Credits

[Amended effective November 1, 1997; November 1, 2004.]

Utah R. Civ. P. 65C. POST-CONVICTION RELIEF

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time

for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h)(1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a

copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(k) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(k)(1) consider the formation and simplification of issues;

(k)(2) require the parties to identify witnesses and documents; and

(k)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(l) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(m) Discovery; records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(n) Orders; stay.

(n)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(n)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(n)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(o) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(p) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Credits

[Adopted effective July 1, 1996; amended effective November 1, 2008; January 4, 2010.]

Addendum B

IN THE DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

*****

STATE OF UTAH, PLAINTIFF,	REPORTER'S TRANSCRIPT
VS.	CASE NO. 031701069
TROVON DONTA ROSS, DEFENDANT.	

*****

TRIAL - VOLUME 5 OF 6

NOVEMBER 8, 2004

HONORABLE RODNEY S. PAGE

*****

APPEARANCES:

FOR THE STATE: MR. WILLIAM K. MCGUIRE
MR. STEVEN V. MAJOR

FOR THE DEFENDANT: MR. STEPHEN R. MCCAUGHEY
MR. WILLIAM ALBRIGHT

*****

ORIGINAL

20041073-SC

FOLLOW THE BAILIFF AT THIS TIME.

(THE JURY EXITS THE COURTROOM.)

THE COURT: YOU TWO ALTERNATES ARE EXCUSED AT THIS TIME. YOU'RE WELCOME TO GO BACK THROUGH THERE AND JUST LEAVE YOUR TABLETS AND YOUR I.D.S THERE ON THE BAILIFF'S DESK. WE'LL KEEP THOSE FOR YOU. THEY WILL NOT BE LOOKED AT; THEY'RE YOUR ITEMS. BUT THEN IF YOU'D REPORT BACK WHEN WE CALL YOU.

WAIT JUST A MINUTE. THE CLERK WILL GET SOME PHONE NUMBERS FROM YOU. OKAY?

(ALTERNATE JURORS LEAVE THE COURTROOM.)

THE COURT: THE JURY IS OUT. MR. MCGUIRE, ANYTHING FURTHER TO COME BEFORE THE COURT?

MR. McGUIRE: NO, YOUR HONOR.

THE COURT: MR. MCCAUGHEY?

MR. McGUIRE: YOUR HONOR, THERE IS -- WE NEED TO MAKE A RECORD, AND I THINK WE NEED TO DO IT IN THE COURT'S CHAMBERS. IT WOULD BE OKAY, I'M SURE, AFTER THE TRIAL'S OVER, JUST IF WE CAN MAKE A RECORD.

THE COURT: OKAY. WE'LL BE IN RECESS THEN. YOU'RE WELCOME TO COME IN CHAMBERS. WE'LL RECONVENE WHEN THE JURY RETURNS.

COURT IS IN RECESS.

(RECESS TAKEN)

THE COURT: WE ARE IN CHAMBERS IN THE MATTER OF

STATE VERSUS ROSS. STATE IS PRESENT REPRESENTED BY MR. MCGUIRE, MR. MAJOR. THE DEFENDANT, MR. ROSS, IS PRESENT REPRESENTED BY HIS ATTORNEYS, MR. MCCAUGHEY AND MR. ALBRIGHT.

THERE IS A MATTER YOU WANTED TO PUT ON THE RECORD, MR. MCCAUGHEY?

MR. McCAUGHEY: THERE IS, YOUR HONOR, AND -- AND IT'S A MATTER I THINK SHOULD BE PUT ON THE RECORD.

MR. ROSS AND I HAVE TALKED ABOUT THIS, BUT AS TO THE MATTER OF STRATEGY THAT WAS IN THIS CASE -- AND I THINK IT'S IMPORTANT MAYBE FOR LATER ON DOWN THE ROAD.

BASICALLY, MR.-- MR. -- WHEN I REPRESENTED -- STARTED REPRESENTING MR. ROSS WE SPOKE -- I SPOKE WITH THE COUNTY ATTORNEY AND THERE WAS AN OFFER MADE. IF MR. ROSS WOULD PLEAD GUILTY, HE WOULD RECEIVE LIFE WITHOUT PAROLE. MR. ROSS AND I DISCUSSED THAT. IT WAS HIS DECISION THAT HE DID NOT WANT LIFE WITHOUT PAROLE, THAT -- THAT HE, IN FACT, DESIRED THE DEATH PENALTY.

AND I INSTRUCTED HIM AT THAT POINT THAT EVEN IF HE PLED GUILTY -- AND THERE WAS A QUESTION OF WHETHER OR NOT THERE COULD BE AN ADMISSION -- EVIDENCE PROBLEMS IN TAKING THAT GUILTY PLEA OF MR. ROSS -- GIVING THAT GUILTY PLEA.

BUT IN THE EVENT THE GUILTY PLEA WAS ACCEPTED, I EXPLAINED TO HIM THAT THERE WOULD STILL BE THE NECESSITY OF A HEARING, A SENTENCING HEARING, THAT THE JUDGE CAN NOT IMPOSE THE DEATH PENALTY WITHOUT THAT HEARING.

AND I ADVISED HIM, MR. ROSS, THAT IF THAT WAS HIS POSITION THEN IT WAS TO HIS BENEFIT TO HAVE A TRIAL BECAUSE, BASICALLY, THE SAME EVIDENCE WOULD BE INTRODUCED AT THE SENTENCING HEARING AS A TRIAL. AND IF HE HAD THE TRIAL, THAT WOULD KEEP HIS OPTIONS OPEN, NOT ONLY FOR POSSIBLE APPEAL DOWN THE ROAD, BUT ALSO FOR HIS TESTIMONY AT THE PENALTY PHASE OF THE HEARING.

I THINK THE COURT CAN QUESTION MR. ROSS, BUT MR. ROSS WAS IN AGREEMENT WITH THAT STRATEGY. I THINK WE FOLLOWED THROUGH WITH THAT STRATEGY. THERE WAS NO MANSLAUGHTER DEFENSE RAISED BASED ON ANY EXTREME EMOTIONAL DISTURBANCE BECAUSE OF -- BECAUSE OF EVIDENTIARY PROBLEMS AS ARE KNOWN TO MR. ROSS AND MYSELF.

BUT ANYWAY, THAT STRATEGY HAS BEEN FOLLOWED AND I THINK IF THERE IS A PENALTY PHASE, MR. ROSS WILL TESTIFY. AND I THINK ONCE THAT HAPPENS, WHAT HE TESTIFIES TO IS REVEALED, I THINK WE'LL -- WE'LL SHOW THE -- THE REASONABLENESS OF THAT STRATEGY. AND SO I JUST WANTED TO PUT THAT ON THE RECORD IN CASE DOWN THE ROAD, WHO KNOWS WHAT WILL HAPPEN.

BUT ANYWAY, THAT'S THE REASON I'VE DONE WHAT I'VE DONE. I THINK MR. ROSS -- HE AND I HAVE TALKED ABOUT THIS A LOT, ON NUMEROUS OCCASIONS, AND I THINK HE AGREES WITH THAT STRATEGY. SO I'D LIKE TO PUT THAT ON THE RECORD.

THE COURT: MR. ROSS, IS THAT, IN FACT, THE CONVERSATION AND THE STRATEGY THAT YOU AND MR. MCCAUGHEY HAVE

DECIDED ON IN THIS CASE?

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

ALL RIGHT. WE'LL BE IN RECESS THEN UNTIL THE JURY RETURNS.

MR. McCAUGHEY: THANK YOU, YOUR HONOR.

(PROCEEDING CONCLUDE IN CHAMBERS.)

(JURY RETURNS.)

THE COURT: WE'RE BACK IN SESSION. THE PARTIES AND COUNSEL ARE PRESENT. THE JURY HAS RETURNED.

LADIES AND GENTLEMEN, HAVE YOU ELECTED A MEMBER OF YOUR JURY AS FOREPERSON?

A JUROR: YES, YOUR HONOR.

THE COURT: THAT'S YOU, MR. GOUGH?

A JUROR: YES, SIR.

THE COURT: HAS THE JURY REACHED A VERDICT?

A JUROR: YES, SIR.

THE COURT: PLEASE DELIVER IT TO THE BAILIFF. THANK YOU, AND YOU MAY BE SEATED.

(VERDICT TENDERED TO THE COURT).

THE COURT: MR. ROSS, IF YOU'D PLEASE STAND? WE'LL ASK THE CLERK TO READ THE VERDICT.

(THE CLERK READS THE VERDICT.)

THE COURT: YOU MAY BE SEATED.

MR. MCCAUGHEY, DO YOU WISH THE JURY POLLED?

Addendum C

174 P.3d 628
Supreme Court of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Trovon Donta ROSS, Defendant and Appellant.

No. 20041073. Nov. 2, 2007.

Synopsis

Background: Defendant was convicted by a jury in the Second District Court, Farmington, Rodney S. Page, J., of aggravated murder and attempted aggravated murder. Defendant appealed.

Holdings: The Supreme Court, Nehring, J., held that:
1 aggravated murder statute was not unconstitutionally vague as applied to defendant;
2 as a matter of first impression, trial court's act of impaneling an anonymous jury did not constitute plain error;
3 the State's remarks during closing arguments did not constitute prosecutorial misconduct; and
4 in a separate opinion, Durham, C.J., held that defendant's convictions for aggravated murder and attempted aggravated murder merged.

Affirmed in part and vacated in part.

Nehring, J., dissented in part and was joined by Wilkins, C.J.

West Headnotes (17)

1 **Criminal Law**
⇐ Constitutional issues in general

The issue of whether a statute is constitutional is a question of law, which the Supreme Court reviews for correctness, giving no deference to the trial court.

2 Cases that cite this headnote

2 **Criminal Law**
⇐ Necessity of Objections in General

To prevail under plain error review, a defendant must demonstrate that (1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error is harmful, or, absent the error, there is a reasonable likelihood of a more favorable outcome.

5 Cases that cite this headnote

3 **Constitutional Law**
⇐ Homicide, mayhem, and assault with intent to kill

Homicide
⇐ Validity

Aggravated murder statute was not unconstitutionally vague as applied to defendant; statute was sufficiently clear to provide defendant notice that his behavior in murdering the victim and attempting to murder her boyfriend while both were at the victim's house was prohibited, as the terms "act," "scheme," "course of conduct," and "criminal episode" had common, easily understood meanings. U.S.C.A. Const.Amend. 14; West's U.C.A. § 76-5-202(1)(b).

4 **Sentencing and Punishment**
⇐ Provision authorizing death penalty

Defendant lacked standing to argue on appeal that the aggravated murder statute's alleged vagueness exposed him to cruel and unusual punishment, where defendant was not sentenced to death for his crimes. U.S.C.A. Const.Amend. 8; West's U.C.A. § 76-5-202(1)(b).

1 Cases that cite this headnote

5 **Sentencing and Punishment**
⇐ Aggravating or mitigating circumstances

The Eighth Amendment requires that statutory aggravators channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death. U.S.C.A. Const.Amend. 8.

6 **Sentencing and Punishment**
⇐ Provision authorizing death penalty

In a case where the government does not seek the death penalty or where the defendant is not

sentenced to death, there can be no actual or threatened injury caused by vagueness in the death penalty statute that is sufficient to justify standing to challenge the constitutionality of the statute under the Eighth Amendment. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

7 **Constitutional Law**

⇐ Certainty and definiteness; vagueness

In order to establish that statutes are so vague that they violate due process, a defendant must demonstrate either (1) that the statutes do not provide the kind of notice that enables ordinary people to understand what conduct is prohibited, or (2) that the statutes encourage arbitrary and discriminatory enforcement. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

8 **Criminal Law**

⇐ Summoning and impaneling jury

Trial court's act of impaneling an anonymous jury did not constitute plain error or require a new murder trial; trial court had a compelling reason to impanel an anonymous jury due to defendant's involvement in organized crime, his past attempts to interfere with the judicial process, and the fact that extensive pretrial publicity could enhance the possibility that the jurors names would become public, and the trial court took precautions to mitigate any potential prejudice to defendant.

3 Cases that cite this headnote

9 **Criminal Law**

⇐ Role and Obligations of Judge

Judges properly enjoy considerable latitude in conducting the affairs of their courtroom so long as courtroom procedures do not communicate bias against the defendant.

10 **Jury**

⇐ Designation and identity of jurors

When impaneling an anonymous jury, the Supreme Court deems it wise that trial courts exercise their discretion in a manner consistent with the approach adopted by the federal courts, which includes: (1) finding a compelling reason to believe the jury needs protection from external sources, and (2) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that the defendant's rights are protected.

3 Cases that cite this headnote

11 **Jury**

⇐ Designation and identity of jurors

Courts typically rely on two general precautions to minimize the prejudicial effects of an anonymous jury: (1) ensuring a meaningful voir dire to expose bias, and (2) offering jury instructions designed to eliminate any implication of the defendant's guilt.

3 Cases that cite this headnote

12 **Criminal Law**

⇐ Homicide and assault with intent to kill

The State's remarks during closing arguments, which stretched the evidence regarding whether defendant's shooting of victim and victim's boyfriend was incident to one act, scheme, course of conduct, or criminal episode, did not constitute prosecutorial misconduct, in prosecution for aggravated murder and attempted aggravated murder; defendant conceded in closing argument that he killed victim and attempted to kill her boyfriend, and evidence established that the murder and attempted murder were part of one act, scheme or course of conduct as defendant showed up at the victim's home with a loaded gun, he spoke with victim and her boyfriend and then shot victim, victim's boyfriend attempted to flee and defendant chased him and fired six shots at him, hitting him once, and then he left the scene and called the victim's father and informed him that he had killed victim and was on his way to father's house to "finish the job." West's U.C.A. § 76-5-202(1)(b).

1 Cases that cite this headnote

13 **Criminal Law**
Conduct of counsel in general

If prosecutorial misconduct is established, the State must show that the error was harmless beyond a reasonable doubt.

1 Cases that cite this headnote

14 **Criminal Law**
Inferences from and Effect of Evidence

Appellate review of a prosecutor's conduct must take into account that a prosecutor has the duty and right to argue the case based on the total picture shown by the evidence or the lack thereof.

15 **Criminal Law**
Scope of and Effect of Summing Up
Criminal Law
Inferences from and Effect of Evidence

Counsel for both sides have considerable latitude in their closing arguments; they have the right to fully discuss from their perspectives the evidence and all inferences and deductions it supports.

16 **Criminal Law**
Merger of offenses

Defendant's convictions for aggravated murder and attempted aggravated murder merged, and thus defendant could only be convicted of aggravated murder; attempted murder was a necessary element to prove the offense of aggravated murder. (Per Durham, C.J., for a majority of the court.) U.S.C.A. Const.Amend. 5; West's U.C.A. §§ 76-1-402(3), 76-5-202.

1 Cases that cite this headnote

17 **Homicide**
First Degree, Capital, or Aggravated Murder

Aggravated murder, a capital crime, requires proof of a statutorily defined aggravating circumstance in addition to an intentional and knowing killing. (Per Durham, C.J., for a majority of the court.) West's U.C.A. § 76-5-202.

Attorneys and Law Firms

*629 Mark L. Shurtleff, Att'y Gen., Matthew D. Bates, Asst. Att'y Gen., Salt Lake City, *630 Steven V. Major, William McGuire, Farmington, for plaintiff.
Elizabeth Hunt, Salt Lake City, for defendant.

Opinion

NEHRING, Justice:

¶ 1 Early on the morning of June 30, 2003, Trovon Ross arrived at the front door of the home of his ex-girlfriend, Annie Christensen. He carried a loaded gun. Mr. Ross entered the home, and after an exchange of words with his ex-girlfriend and her current boyfriend, James May, Mr. Ross forced Ms. Christensen into a bedroom where he shot her three times, killing her.

¶ 2 Mr. May made an attempt to flee in an automobile parked in the garage. But after being intercepted by Mr. Ross, Mr. May exited the car and took flight on foot. Mr. Ross chased him out of the garage and down the street, firing six shots at him. One shot struck Mr. May, wounding him.

¶ 3 Mr. Ross was apprehended following a chase. He was charged and convicted of aggravated murder and attempted aggravated murder. At Mr. Ross's trial, the sole issue in contention was whether he should be convicted of murder or aggravated murder. Mr. Ross now challenges his conviction on the basis of four claims of error, only the first of which was preserved at the trial court level. First, Mr. Ross alleges he was convicted under an unconstitutional statute-Utah Code section 76-5-202(1)(b) (2003). Second, Mr. Ross contends that his attempted aggravated murder conviction should merge with his aggravated murder conviction. Third, Mr. Ross asserts that the impaneling of an anonymous jury was unfairly prejudicial. And fourth, Mr. Ross believes the State committed prosecutorial misconduct during closing arguments, which affected the outcome of the case, requiring a new trial. We reject Mr. Ross's first, third, and fourth claims; however, the majority finds that the aggravated murder and attempted aggravated murder charges should merge and that the attempted aggravated murder conviction should be vacated.

BACKGROUND

¶ 4 Mr. Ross knocked on Ms. Christensen's door in Clinton, Utah, at approximately 6:10 a.m. on June 30, 2003. Ms. Christensen answered the door and let him in the house. Mr. Ross waited in the front room while Ms. Christensen went to her bedroom and returned with her boyfriend, Mr. May.

¶ 5 Mr. Ross began to interrogate Ms. Christensen about her relationship with Mr. May, asking intimate questions about their sexual activity. When Ms. Christensen did not respond to Mr. Ross's questions, he pulled a gun from his waistline and put the questions to Ms. Christensen again. Ms. Christensen repeatedly asked Mr. Ross to leave, but he would not do so until she answered his questions.

¶ 6 Mr. Ross then asked Mr. May, "Do you have any family here?" Mr. May did not answer, and Mr. Ross responded, "I can't let her hurt you like she hurt me." Mr. Ross then grabbed Ms. Christensen, pointed the gun at her, and pushed her past Mr. May toward the bedroom. Mr. May believed Mr. Ross was going to kill both Ms. Christensen and him and, apparently in an effort to dissuade Mr. Ross from following through with his plan, told Mr. Ross that the Air Force would be looking for him. Unimpressed, Mr. Ross pushed past Mr. May and took Ms. Christensen to the bedroom.

¶ 7 Mr. May fled to the garage and entered his car. Soon thereafter, he heard a gunshot, a pause, then two more gunshots. Mr. May's car was equipped with an ignition interlock device, requiring him to blow into a breathalyzer to demonstrate that he was not intoxicated before his car would start. He blew into the breathalyzer, but because his breathing was "too erratic," the breathalyzer would not permit ignition.

¶ 8 Mr. Ross then appeared in the doorway to the garage. Mr. May threw his keys out of the car, fled the garage, and began to run down the street. Mr. Ross followed, firing six shots. The second shot went through Mr. May's right arm and into his chest, lodging itself under the skin in front of his ribs.

¶ 9 Still able to run despite his wound, Mr. May ran from house to house searching for **631* assistance. He finally managed to stop a car in the street, and the driver called the police. An off-duty officer arrived, and Mr. May told him that Ms. Christensen had been shot and directed the officer to her house.

¶ 10 At least two of Ms. Christensen's neighbors heard the gunfire and saw a white van back quickly out of her driveway, hitting a mailbox before speeding off. The neighbors called 911 and reported the shots and the van's description. Clinton City police arrived at Ms. Christensen's house within minutes of the shooting and found her dead on the floor of her bedroom. An examination of her body revealed three gunshot wounds: one to the back right side of the head, one to the neck, and one to the abdomen.

¶ 11 Meanwhile, at 6:20 that morning, Mr. Ross called Steven Christensen, Ms. Christensen's father. Mr. Ross informed Mr. Christensen that he had just killed his daughter and was "on [his] way to [Mr. Christensen's] home to finish the job."

¶ 12 Several Clearfield City police officers heard the broadcast of the van's description and headed toward the area of the shooting. They passed the van en route, turned around, and activated their lights and sirens, but Mr. Ross would not pull over. The police eventually cornered Mr. Ross in a cul-de-sac of a residential area and, after a brief foot chase, arrested him.

¶ 13 The State charged Mr. Ross with aggravated murder, attempted aggravated murder, and failure to obey an officer's signal to stop. Mr. Ross was tried before a jury in November 2004. At trial, Mr. Ross did not contest his participation in the crimes, but rather limited his efforts to persuading the jury that he was not guilty of aggravated murder. Mr. Ross contended that the killing of Ms. Christensen and the shooting of Mr. May were not "committed incident to one act, scheme, course of conduct, or criminal episode" under Utah Code section 76-5-202(1)(b) and thus did not amount to aggravated murder.

¶ 14 Concerned that the case might "generate substantial public interest and media attention," the trial court impaneled an anonymous jury "to protect the identity and privacy of the jurors[ ] and to protect jurors, witnesses, and parties from unnecessary commotion, confusion, or influence." The court sought to preserve the jurors' anonymity by assigning each of them a number by which they were identified during the trial. The court informed jurors on more than one occasion-both verbally in the trial court proceedings and on the jury questionnaire that each prospective juror completed-that the use of numbers was to protect their privacy and to encourage jurors' candor during the voir dire process. With one exception, each prospective juror was addressed by both name and number during in-chamber interviews conducted during the course of jury selection. In four different interviews, defense counsel referred to prospective jurors by name, and the State did so three times.

¶ 15 After a three-day trial, the jury convicted Mr. Ross of aggravated murder and all other charges. Mr. Ross waived his right to a jury in the penalty phase, and the State recommended he serve life without parole for the aggravated murder conviction. The court agreed and sentenced him to concurrent prison terms of life without parole, five years to life, and zero to five years.

¶ 16 Mr. Ross appealed.

STANDARD OF REVIEW

1 2 ¶ 17 Mr. Ross preserved only the first of his four issues raised on appeal. As Mr. Ross's constitutional claim was preserved, we review that issue for correctness. *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 7, 67 P.3d 436. "The issue of whether a statute is constitutional is a question of law, which we review for correctness, giving no deference to the trial court." *Id.* (internal quotation marks and citation omitted). Mr. Ross's other three claims were unpreserved, and we review them for plain error. *See State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551; *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 16, 94 P.3d 186. To prevail under plain error review, a defendant must demonstrate that " '(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome.' " *632 *State v. Lee*, 2006 UT 5, ¶ 26, 128 P.3d 1179 (quoting *State v. Hassan*, 2004 UT 99, ¶ 10, 108 P.3d 695).

ANALYSIS

¶ 18 With our standard of review in hand, we turn to assessing the merits of Mr. Ross's four issues: (1) whether the subsection of the Utah death penalty statute, under which Mr. Ross stands convicted, is unconstitutionally vague; (2) whether Mr. Ross's aggravated murder conviction and attempted aggravated murder conviction should merge; (3) whether the impaneling of an anonymous jury prejudiced the jury against Mr. Ross; and (4) whether the alleged prosecutorial misconduct requires a new trial.

¶ 19 This opinion contains the majority as to issues (1), (3), and (4) and the dissent as to issue (2). The majority as to issue (2) is contained in the separate opinion of Chief Justice Durham, joined by Justice Durrant and Justice Parrish. The dissenting view in section II of this opinion is that of Justice Wilkins and me.

I. UTAH CODE SECTION 76-5-202(1)(b) IS NOT UNCONSTITUTIONALLY VAGUE

3 4 ¶ 20 We first address whether Utah Code section 76-5-202(1)(b) is unconstitutionally vague as applied to Mr. Ross. Mr. Ross insists that the vagueness of the aggravated murder statute does not measure up to the guarantees of due process of law and freedom from the imposition of cruel and unusual punishment enshrined in both the United States Constitution and the Utah Constitution. First, we hold that because Mr. Ross was not sentenced to death, he lacks standing to assert that the statute's vagueness exposed him to cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Next, we reach the merits of Mr. Ross's constitutional due process assaults on section 76-5-202(1)(b), but we find that the statute survives them because it is not unconstitutionally vague as applied to Mr. Ross's conduct.

¶ 21 Section 76-5-202(1)(b) provides in pertinent part that

> [c]riminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another ... [where] the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed.

Utah Code Ann. § 76-5-202(1)(b) (2003). According to Mr. Ross, the vulnerable language of the statutory text is the phrase "act, scheme, course of conduct, or criminal episode." Mr. Ross would have us conclude that this phrase is so vague that the Constitution renders it void.

¶ 22 We do not reach the merits of Mr. Ross's Eighth Amendment vagueness challenge because he does not have standing to bring his claim. Like the Fourteenth Amendment, the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits vague statutes, but in this setting the Eighth Amendment will intercede only on behalf of defendants who face the death penalty.

¶ 23 Mr. Ross takes issue with this proposition. His objection, despite being off the mark, gives us cause to note the presence of two separate strands of Eighth Amendment jurisprudence. The first, and likely more familiar, is the proportionality strand. These cases explore the relationship between offenses and the severity of their resulting punishments. *See generally*

Ewing v. California, 538 U.S. 11, 20-28, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (reviewing Supreme Court jurisprudence on the proportionality requirement of the Eighth Amendment). The second strand of cases looks to the Eighth Amendment as a basis upon which to insist that criteria used by sentencers to impose the death penalty be employed in a discriminating, principled way. The preeminent case in this strand is *Maynard v. Cartwright*, 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). It is to this component of the Eighth Amendment doctrine that Mr. Ross directs us when he challenges the constitutionality of section 76-5-202(1)(b).

5 6 ¶ 24 The Eighth Amendment requires that statutory aggravators "channel **633* the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (internal quotation marks and citations omitted). Yet, "[t]o meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Houston v. Roe*, 177 F.3d 901, 907 (9th Cir.1999) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). Further, "[t]he injury must be distinct and palpable not merely speculative, and the harm must be imminent and not hypothetical." *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). In a case where the government does not seek the death penalty or where the defendant is not sentenced to death, there can be no actual or threatened injury caused by vagueness in the death penalty statute that is sufficient to justify standing. *Id.*

¶ 25 Our approach to Eighth Amendment challenges to Utah's death penalty statute is in harmony with federal jurisprudence on the topic as we, too, have denied standing to a defendant not sentenced to death who, under the Eighth Amendment, sought to challenge the vagueness of the aggravating circumstances set out in Utah's death penalty statute. *State v. Tuttle*, 780 P.2d 1203, 1215 (Utah 1989). Mr. Ross was sentenced to life in prison without the possibility of parole. And like the defendant, Mr. Tuttle, Mr. Ross lacks standing to challenge the statute under the Eighth Amendment.

¶ 26 Mr. Ross appears to believe that our conclusion that Mr. Tuttle did not have standing because he was not sentenced to death was wrong because the United States Supreme Court has made the Eighth Amendment available to challenge sentences less than death. The Supreme Court cases cited by Mr. Ross to make this point are, however, cases culled from the proportionality strand of Eighth Amendment jurisprudence that have nothing to do with the interpretation and application of death penalty statutes.

7 ¶ 27 While standing does not foreclose Mr. Ross's remaining due process claims, we find none to be compelling. In order to establish that statutes are so vague that they violate due process, "a defendant must demonstrate either (1) that the statutes do not provide 'the kind of notice that enables ordinary people to understand what conduct [is prohibited],' or (2) that the statutes 'encourage arbitrary and discriminatory enforcement.' " *State v. MacGuire*, 2004 UT 4, ¶ 13, 84 P.3d 1171 (alteration in original) (quoting *State v. Honie*, 2002 UT 4, ¶ 31, 57 P.3d 977); *see also Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). And where, as here, a defendant's claim does not concern an alleged infringement of a First Amendment right, the defendant must first show that the statute is vague as applied to his conduct, before he can attempt to show that the statute is vague in all of its applications. *State v. Green*, 2004 UT 76, ¶¶ 44, 45 n. 15, 99 P.3d 820 (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). This means that a defendant may not complain of the vagueness of the law as applied to others if its language affords the defendant adequate notice that his conduct was proscribed. *Id.*

¶ 28 First, we find that the language of section 76-5-202(1)(b) is sufficiently clear to give Mr. Ross notice that the behavior he engaged in was prohibited. The statute provides that a murder charge may be increased to aggravated murder if it is committed "incident to one act, scheme, course of conduct, or criminal episode" where another murder is completed or attempted. Utah Code Ann. § 76-5-202(1)(b). Although we do not concede that the statute requires additional clarification to impart sufficient notice on those who might wish to modify their conduct to avoid its application, we will nevertheless point out several of its most obvious organizing features. To trigger section 76-5-202(1)(b), additional murders or their attempts must be related in some way to one another. Close temporal proximity is the most apparent measure of linkage, as the phrase "incident to one act" suggests. Time is not the only possible connecting characteristic, **634* however, inasmuch as multiple murders or attempts incident to one "scheme" may occur over an extended period of time. The relevant nexus connoted by "scheme" is a plan that targets multiple victims. *See State v. Bradshaw*, 2006 UT 87, ¶¶ 12-16, 152 P.3d 288 (discussing when multiple related

acts may constitute a single scheme in the communications fraud context). A single "course of conduct" implies a more lengthy duration than an "act" and a lesser emphasis on planning than a "scheme," but nevertheless, the term includes elements of both act and scheme. One "criminal episode" is, like "scheme," not particularly temporally dependent, but rather appears to address even otherwise random murders or attempts committed while the defendant is undertaking another criminal activity. Contrary to what Mr. Ross suggests, the terms "act," "scheme," "course of conduct," and "criminal episode" have common, generally understood meanings. And where statutory terms are "readily ascertainable," the vagueness doctrine does not require a legislature to redefine them. *See* MacGuire, 2004 UT 4, ¶ 31, 84 P.3d 1171.

¶ 29 Moreover, the statutory terms acquire greater clarity when considered in the context of the whole provision. The individual terms are shaped and their definitional contours sharpened through comparisons and contrasts to their companions. Thus, the clarity of the whole of the statute is greater than the sum of its individual parts. The individual terms "act," "scheme," "course of conduct," and "criminal episode," taken together in context of the statute, indicate a requirement that the foundational act (a murder) and the aggravating act (a second murder or an attempted murder) be linked by a degree of commonality. Whether time, place, manner, purpose, or a combination of the four serve to link the foundational act to the aggravating act for the purpose of this statute, it is clear that the statute requires that there be some indicia that separate acts are parts of a whole.

¶ 30 Stated most simply, section 76-5-202(1)(b) applies to murders or attempts linked by time, place, or purpose. It is clear to us that the statute would fully communicate to Mr. Ross, as he stood armed with jealous rage and a pistol, waiting for Ms. Christensen to answer her door early on the morning of June 30, that what could transpire in the ensuing minutes could well be crimes and tragedies incident to one criminal episode or course of conduct.

¶ 31 Mr. Ross killed Ms. Christensen and attempted to kill Mr. May in a sequence of events closely linked by all three elements of time, place, and purpose. A simple timeline of events illustrates how closely related in time, place, and purpose Mr. Ross's actions were: Mr. Ross drove to Ms. Christensen's home; he rang the doorbell, entered Ms. Christensen's home, and questioned her and Mr. May; he forced Ms. Christensen into her bedroom and shot and killed her with three bullets; he found Mr. May in the garage, chased after him, and fired six bullets, injuring Mr. May with the second shot; he called Ms. Christensen's father, told him that he had just killed his daughter, and that he was on his way to Mr. Christensen's home to "finish the job"; and finally, while still driving, he was apprehended by the police. All of this occurred between 6:00 a.m. and 7:00 a.m.

¶ 32 The trial evidence-most prominently Mr. Ross's interrogation of Ms. Christensen regarding the recent sexual activity of Ms. Christensen and Mr. May-leaves little doubt that Mr. Ross's jealousy and anger over Ms. Christensen's spurning of his affections impelled him to appear at Ms. Christensen's door. We have little difficulty matching the terms "course of conduct" and "criminal episode" to the murder and attempted murder that Mr. Ross committed within the span of less than one hour, motivated by his jealousy and rage. It may be that, at the boundaries, the statute is unclear about when two or more separate acts are part of a single whole. But this is not a boundary case. The statute, therefore, is constitutional as applied to Mr. Ross.

II. MR. ROSS'S ATTEMPTED AGGRAVATED MURDER CONVICTION SHOULD NOT MERGE WITH HIS AGGRAVATED MURDER CONVICTION

¶ 33 We next take up Mr. Ross's claim that the trial court committed plain error when it **635* permitted the jury to convict him of both aggravated murder and attempted aggravated murder, instead of merging the two convictions into a single crime. Although I do not hold the majority on this issue, I would find that no error occurred because Utah Code section 76-5-202 is an enhancement statute; the two convictions therefore should not merge.

¶ 34 Mr. Ross contends that merger was mandated because the attempted murder charge was a necessary predicate to, and a lesser included offense of, the aggravated murder charge. Utah Code section 76-1-402(3) permits greater and lesser included offenses to merge. An offense is "lesser included" and eligible for merger when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the [greater] offense charged...." Utah Code Ann. § 76-1-402(3)(a) (2003). We have interpreted this provision to mean that "where the two crimes are 'such that the greater cannot be committed without necessarily having committed the lesser,' then as a matter of law they stand in the relationship of greater and lesser offenses, and the defendant cannot be convicted or punished for both." *State v. Hill*, 674 P.2d 96, 97 (Utah 1983) (quoting *State v. Baker*, 671 P.2d 152, 156 (Utah 1983)). Although merger is codified in statute, it has a constitutional pedigree as it provides a means to prevent

violations of constitutional double jeopardy protection. *State v. Smith*, 2005 UT 57, ¶ 7, 122 P.3d 615.

¶ 35 A criminal statute is freed from double jeopardy concerns and exempted from the merger requirements in Utah Code section 76-1-402(3) if it is clear from the "plain language and structure" of the pertinent provision that the statute is an enhancement statute, i.e., that the legislature "intended to enhance the penalty for one type of offense when certain characteristics are present that independently constitute a different offense." *Id.* ¶ 11. Enhancement statutes differ from other criminal statutes by singling out "particular characteristics of criminal conduct as warranting harsher punishment." *Id.* ¶ 10 (citing *State v. McCovey*, 803 P.2d 1234, 1237 (Utah 1990)). But "if the legislature intends to preclude [a statute] from requiring merger in a specific instance, it must clearly indicate that the provision in question is intended to enhance the penalty for one type of offense when certain characteristics are present that independently constitute a different offense." *Id.* ¶ 11.

¶ 36 In *Smith,* we held Utah Code section 76-10-504(3) to be an enhancement provision because it enhances "the penalty for the offense of carrying a concealed firearm when the offense is committed in conjunction with a crime of violence, a separate offense." *Id.* ¶ 13. We found it relevant that the statute enumerated various levels of offenses depending on the type of weapon involved and on the circumstances in which carrying a concealed weapon occurs. *Id.*

¶ 37 Our experience in assessing the characteristics of an enhancement statute in *Smith* serves us well here. While Utah Code section 76-5-202 lacks the clear-cut "graduated punishment scale" of Utah Code section 76-10-504(3), it unmistakably enhances "criminal homicide" to "aggravated murder" when the murder is committed in conjunction with one of the several enumerated aggravating circumstances, some of which constitute separate, independent crimes. Section 76-5-202 does not define aggravated murder by setting out a set of elements unique to that offense. Rather, the statute provides that murder should be enhanced to aggravated murder when a homicide is accompanied by one of several listed aggravators. Specifically, the aggravating circumstance at issue here requires that murder be enhanced to aggravated murder if the murder is committed incident to a single "act, scheme, course of conduct, or criminal episode ... during which the actor attempted to kill one or more persons in addition to the victim who was killed." Utah Code Ann. § 76-5-202(1)(b). The purpose and effect of this language-dictated by the plain language and structure of the statute-is to enhance the degree of punishment for the murder because it was committed in conjunction with an attempted murder, a separate offense. Thus, the structure of section 76-5-202 demonstrates to our satisfaction that its purpose is to single out circumstances that merit a greater *degree* of ***636** punishment for murder than that otherwise provided for perpetrators of criminal homicide. The statute is, therefore, an enhancement statute not subject to the merger doctrine. The trial court did not err when it permitted the jury to convict Mr. Ross of both aggravated murder and attempted aggravated murder.

¶ 38 The majority takes issue with this assessment and asserts that under Utah Code section 76-1-402(3) the attempted murder and the aggravated murder charges against Mr. Ross should be merged. Pointing to *State v. Shaffer*, 725 P.2d 1301 (Utah 1986), and *State v. Wood*, 868 P.2d 70 (Utah 1993), *overruled on other grounds by State v. Mirquet*, 914 P.2d 1144 (Utah 1996), the majority contends that this court has already found that the merger doctrine applies to Utah Code section 76-5-202, the aggravated murder statute. I am neither persuaded that we have, nor that we should.

¶ 39 It is true that we held in both *Shaffer* and *Wood* that the underlying aggravating crime should merge with the aggravated murder charge. What we did not discuss in either case was whether section 76-5-202 was an enhancement statute and, thus, exempt from the merger requirements. In *Smith,* we emphasized the need to determine whether a statute was an enhancement statute as a necessary third step in the merger analysis: "In *McCovey,* however, this court in effect added a third step to the [merger] analysis, holding that in cases where the legislature intended a statute to be an enhancement statute, the merger doctrine set forth in section 76-1-402(3) does not apply." 2005 UT 57, ¶ 9, 122 P.3d 615 (citing *McCovey*, 803 P.2d at 1237). Because neither *Shaffer* nor *Wood* mentions section 76-5-202 in the context of enhancement,[1] those cases do not control our decision on the enhancement question. And because my decision rests on our determination that, under *Smith,* section 76-5-202 is an enhancement statute, I am not troubled by *Shaffer's* and *Wood's* holdings that section 76-5-202 meets the first two of the three steps in a merger analysis.

III. THE IMPANELING OF AN ANONYMOUS JURY DOES NOT REQUIRE A NEW TRIAL

8 ¶ 40 We next consider whether the trial court committed plain error when it impaneled an anonymous jury. We

conclude that the trial court was justified in believing it confronted a need to protect the jury from media exposure and that this concern could be effectively addressed by impaneling an anonymous jury. We further conclude that the trial court implemented reasonable and workable precautions to ensure that Mr. Ross was not prejudiced by the decision to refer to jurors by number instead of by name.

¶ 41 Our task of considering whether or not it is appropriate to impanel an anonymous jury is an issue of first impression for this court. The absence of any direction from our appellate courts on the subject of anonymous juries is reason enough to overcome an unpreserved issue for which review is sought based on plain error since a trial court could hardly be faulted for failing to take note of jurisprudence that does not exist. *See* State v. Ross, 951 P.2d 236, 239 (Utah Ct.App.1997). Still, if the trial judge should have apprehended that by impaneling an anonymous jury he would prejudice Mr. Ross or if the trial court had impaneled the anonymous jury in a manner that resulted in prejudice, we could reach the merits and, if appropriate, provide a remedy by invoking the plain error exception to our preservation requirement, even in the absence of clear Utah precedent on the matter. We do not believe that the trial judge plainly erred in this instance. But because there is no present guidance for trial courts on this question, we take this opportunity first to outline the principles that should guide a trial court when faced with the issue of whether and how to impanel an anonymous jury and then **637* to note that this trial judge acted well within those parameters.

¶ 42 We would not, however, liberally exercise our authority to intercede to undo a trial judge's decision to impanel an anonymous jury because that decision is highly fact intensive and well within the scope of a trial judge's discretionary powers. *See* State v. Samonte, 83 Hawai'i 507, 928 P.2d 1, 17 (1996). It is a decision that requires a trial judge to draw on the training and temperament that form the very core of judging and is therefore a decision that is entitled to deferential treatment by a reviewing court. *See* State v. Bowles, 530 N.W.2d 521, 531 (Minn.1995).

9 10 ¶ 43 Judges properly enjoy considerable latitude in conducting the affairs of their courtroom so long as courtroom procedures do not communicate bias against the defendant. When impaneling an anonymous jury, we deem it wise that trial courts exercise their discretion in a manner consistent with the approach adopted by the federal courts, which includes (1) finding a compelling reason to believe the jury needs protection from external sources and (2) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that the defendant's rights are protected. *See, e.g.*, State v. Brown, 280 Kan. 65, 118 P.3d 1273, 1279 (2005).

¶ 44 While the trial court in this case did not have the benefit of precedent from this court, we believe that it impaneled an anonymous jury appropriately and, in fact, adhered closely to the principles reflected in these two guidelines. First, the trial court had a compelling reason to impanel an anonymous jury. Compelling reasons for impaneling an anonymous jury include: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that the jurors' names become public and expose them to intimidation or harassment. *Id.; see also* United States v. Ross, 33 F.3d 1507, 1520 (11th Cir.1994); United States v. Coonan, 664 F.Supp. 861, 862 (S.D.N.Y.1987); *Samonte*, 928 P.2d at 14.

¶ 45 The trial court presiding over Mr. Ross's trial impaneled an anonymous jury because of the threat of extensive publicity about the case. As our factual narrative amply demonstrates, this was a crime that featured an embittered ex-lover, a gruesome killing, a suspenseful escape, a police chase, and an abundance of other elements that made the trial an irresistible media event. The trial court's desire to protect the jurors' privacy and its concern about how significant media attention might jeopardize the ability of the jury to do its work justified its decision to opt for an anonymous jury.

11 ¶ 46 The trial court also took precautions to mitigate any potential prejudice that the defendant might suffer as a result of being tried before an anonymous jury. Courts typically rely on two general precautions to minimize the prejudicial effects of an anonymous jury: (1) ensuring a meaningful voir dire to expose bias and (2) offering jury instructions designed to eliminate any implication of the defendant's guilt. *Samonte*, 928 P.2d at 13-14; State v. Ford, 539 N.W.2d 214, 221 (Minn.1995); *Bowles*, 530 N.W.2d at 530. The trial court here-again unaided by any precedent from this court-took each of these precautions to ensure that Mr. Ross was not unfairly prejudiced.

¶ 47 Effective voir dire, one in which counsel and the trial court are able to fully explore and expose bias, is a powerful antidote to any prejudice, including that which

might result from an anonymous jury. *Samonte*, 928 P.2d at 15-16. Ensuring that jury anonymity does not interfere with the opportunity to conduct a meaningful voir dire, therefore, is critical.

¶ 48 In this case, voir dire was meaningful, with measures taken to expose the biases of the jurors. In addition to the jury questionnaire, the court asked some follow-up questions in private interviews concerning specific answers the potential jurors provided in the questionnaires. It asked them about their feelings regarding the death penalty and whether they "could be fair to both prosecution **638* and defense on the issue of punishment." The court informed the jurors that "the defendant is presumed innocent and all presumptions of law are in favor of his innocence." Finally, it told them that "the defendant is never required to prove his innocence." This effective voir dire mitigated any prejudice that Mr. Ross might have suffered from being tried before an anonymous jury.

¶ 49 To further reduce the risk of prejudice, a trial court should instruct jurors in a way that recognizes the threat that an anonymous jury poses to a defendant's presumption of innocence. This may be accomplished in many ways, including, for example, taking care to avoid calling attention to the anonymity of the jury or otherwise suggesting that, owing to its uniqueness, jury anonymity is reserved for a trial of particularly heinous crimes or dangerous and obviously guilty defendants. Among instructions emphasizing the presumption of innocence, "[t]he trial court should give anonymous jurors a plausible and nonprejudicial reason for not disclosing their identities that decreases the probability that the jurors would infer that the defendant is guilty or dangerous." *Samonte*, 928 P.2d at 16. For example, a court might instruct anonymous jurors that "the purpose for juror anonymity is to protect the jurors from contacts by the news media, thereby implying that juror anonymity is not the result of threats from the criminal defendant." *Id.*

¶ 50 In this case, the trial judge met every reasonable expectation we could impose on him to send the jury into its deliberations free of any sense that their anonymity somehow implied that Mr. Ross was guilty. Specifically, the trial court advised the jurors, on more than one occasion, that their anonymity was to protect their privacy and to encourage their candor during the voir dire process. Further, the court explained in its decorum order that another purpose of anonymity was to shield the jurors from potential media harassment. This order offered jurors a plausible and nonprejudicial explanation for why they were impaneled anonymously, which reduced the possibility that they believed their anonymity was tied to Mr. Ross's guilt or dangerous nature.

¶ 51 Additionally, jurors should have known from in-chamber interviews that their anonymity was primarily for privacy and protection from the media, not from Mr. Ross. With one exception, each prospective juror was addressed by both name and number during in-chamber interviews. In four different interviews, defense counsel referred to prospective jurors by name, and the State did so three times.

¶ 52 In sum, the trial court did not plainly err in impaneling an anonymous jury. It had sufficient cause to do so, including the need to protect the jury from the media and to encourage candor during the voir dire process. The court also took reasonable precautions to minimize prejudicial effects on Mr. Ross by ensuring a thorough voir dire process and by providing a plausible and nonprejudicial explanation for the jurors' anonymity.

IV. THE STATE'S REMARKS DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT, AND TRIAL COUNSEL'S FAILURE TO OBJECT DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL

12 ¶ 53 Finally, we consider whether the State's remarks during closing arguments constitute prosecutorial misconduct. Applying our plain error standard of review, we hold that they do not. Even if the statements made by the State during closing arguments were not all fair inferences drawn from the evidence proffered during trial, they were harmless in the face of the overwhelming evidence of Mr. Ross's guilt. Therefore, it was not plain error for the trial court not to have intervened when the State stretched evidence regarding the only disputed point in the case-whether Mr. Ross's shooting of Ms. Christensen and Mr. May was incident to "one act, scheme, course of conduct, or criminal episode" under Utah Code section 76-5-202(1)(b) (2003).

13 ¶ 54 This court set forth the test for prosecutorial misconduct in *State v. Valdez*, stating:

> **639* The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the

circumstances of the particular case, probably influenced by those remarks.

30 Utah 2d 54, 513 P.2d 422, 426 (1973). This two-part test must be applied "under the circumstances of the particular case." *State v. Troy*, 688 P.2d 483, 486 (Utah 1984). In assessing the second component of the test, " '[i]f proof of defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial.' " *Id.* (quoting *State v. Seeger*, 4 Or.App. 336, 479 P.2d 240, 241 (1971)). If prosecutorial misconduct is established, the State must show that the error was harmless beyond a reasonable doubt. *State v. Eaton*, 569 P.2d 1114, 1116 (Utah 1977).

14 **15** ¶ 55 Our review of a prosecutor's conduct must also take into account that "[a] prosecutor has the duty and right to argue the case based on the 'total picture shown by the evidence or the lack thereof.' " *State v. Hales*, 652 P.2d 1290, 1291 (Utah 1982) (quoting *State v. Kazda*, 540 P.2d 949, 951 (Utah 1975)). Furthermore, "[c]ounsel for both sides have considerable latitude in their closing arguments. They have the right to fully discuss from their perspectives the evidence and all inferences and deductions it supports." *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989); *see also State v. Lafferty*, 749 P.2d 1239, 1255 (Utah 1988).

¶ 56 The State did, in fact, seize a sizeable portion of latitude during closing arguments in recounting the events surrounding the death of Ms. Christensen. For example, the State implied that Mr. Ross ordered both Ms. Christensen and Mr. May back to the bedroom, but Mr. May actually testified that Mr. Ross only pushed Ms. Christensen toward the bedroom.[2] Also, the State reminded the jury that Mr. May said "very few seconds" elapsed between the time when Mr. Ross killed Ms. Christensen and when he approached Mr. May in the garage and began shooting at him. Mr. May, however, gave no specific time frame for the sequence of the events.[3] The jury could infer from these remarks that the attempt to kill Mr. May was part of the same "act, scheme, course of conduct, or criminal episode" as the murder of Ms. Christensen, which was required to convict Mr. Ross of aggravated murder.

¶ 57 While these two remarks were questionable-especially considering that they bear on the main issue in the case of whether or not Mr. Ross was guilty of murder or aggravated murder-they were also harmless given the weight of evidence against Mr. Ross. Proof of Mr. Ross's guilt is strong in this case. In fact, at trial, Mr. Ross conceded in closing argument that he did not dispute the State's evidence and that there was not "much doubt, in view of the evidence that [he] killed Ms. Christensen, and that he attempted to kill Mr. May." The question then became whether "the homicide was committed incident to one act, scheme, course of conduct, or criminal episode ... during which [Mr. Ross] attempted to kill one or more persons in addition to the victim who was killed." Utah Code Ann. § 76-5-202(1)(b).

¶ 58 As we indicated in section I of our analysis, there is ample evidence in the record to demonstrate that the murder of Ms. Christensen and the attempted murder of Mr. May were, indeed, two parts of a single "act, scheme, course of conduct, or criminal episode." Specifically, the evidence shows that Mr. Ross showed up at Ms. Christensen's ***640** home with a loaded, concealed handgun. After speaking to both Ms. Christensen and Mr. May, Mr. Ross took Ms. Christensen into the bedroom and shot her. Mr. Ross proceeded directly to the garage, where Mr. May was attempting to flee. Mr. Ross chased Mr. May out of the garage and fired six shots at him, injuring him with one of the shots. Mr. Ross then called Ms. Christensen's father and told him that he had just shot his daughter and that he was on his way to Mr. Christensen's home to finish the job. The evidence that the murder and the attempted murder were part of a single "act, scheme, course of conduct, or criminal episode" is strong, even absent the questionable statements made by the prosecution in its closing arguments. The doctrine of prosecutorial misconduct, therefore, does not apply, and it was not plain error for the trial court not to have intervened.

CONCLUSION

¶ 59 In conclusion, we hold that Utah Code section 76-5-202(1)(b) is not unconstitutionally vague since the plain meaning of the statutory terminology provides sufficient notice of the prohibited conduct. We also hold that the impaneling of an anonymous jury, under the circumstances of this case, does not require a new trial, particularly where the trial court took necessary precautions to ensure that this procedure was not unfairly prejudicial to Mr. Ross. Finally, the State's remarks during closing arguments did not constitute prosecutorial misconduct given the weight of evidence against Mr. Ross. We therefore affirm Mr. Ross's convictions for aggravated murder. The majority finds that Mr. Ross's aggravated murder conviction and his attempted aggravated murder conviction should merge and vacates his attempted aggravated murder conviction.

¶ 60 Associate Chief Justice WILKINS concurs in Justice NEHRING's opinion.

DURHAM, Chief Justice, writing for the majority:

16 ¶ 61 According to this court's precedent, an underlying felony that constitutes the aggravating circumstance merges with the conviction for aggravated murder pursuant to Utah Code section 76-5-202. Therefore, it was impermissible for the trial court to allow convictions to stand for both aggravated murder and attempted aggravated murder when the attempted murder of Mr. May was the only aggravating factor presented to the jury.

17 ¶ 62 Aggravated murder, a capital crime, "requires proof of a statutorily defined aggravating circumstance in addition to an intentional and knowing killing." *State v. Shaffer*, 725 P.2d 1301, 1313 (Utah 1986). In the instant case, the sole aggravating circumstance presented to the jury was whether "the homicide was committed incident to one act, scheme, course of conduct, or criminal episode ... during which the actor attempted to kill one or more persons in addition to the victim who was killed." Utah Code Ann. § 76-5-202(1)(b) (2003). Proof of the attempted murder of Mr. May served as the aggravating circumstance allowing for Mr. Ross's conviction for capital murder.

¶ 63 The merger doctrine, derived from the Fifth Amendment's Double Jeopardy Clause, prevents a defendant from being convicted of "both the offense charged and the included offense." Utah Code Ann. § 76-1-402(3) (2003 & Supp.2007). An offense is included when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged." *Id.* § 76-1-402(3)(a). In the case before us, where the attempted murder of Mr. May was the sole aggravating factor presented to the jury, the attempted murder is a lesser included offense of the aggravated murder. Proof of the facts of the attempted murder were necessary to establish the commission of the aggravated murder.

¶ 64 On more than one occasion, this court has determined that the merger doctrine applies to Utah Code section 76-5-202. In *State v. Shaffer*, we held that aggravated robbery merged with aggravated murder when robbery was the sole aggravating circumstance for the capital murder conviction. 725 P.2d at 1313. Similarly, in *State v. Wood*, we held that the predicate offense of aggravated sexual assault merged with the conviction for aggravated murder. *641 868 P.2d 70, 90 (Utah 1993), *overruled on other grounds by State v. Mirquet*, 914 P.2d 1144 (Utah 1996).[1] Since *Shaffer* and *Wood* were decided, the legislature has not modified the provisions of Utah Code section 76-5-202 in any manner that would alter our analysis. *Compare* Utah Code Ann. § 76-5-202 (2003), *with id.* § 76-5-202 (Supp.1993), *and id.* § 76-5-202 (Supp.1986). Although the legislature has added new aggravating factors and affirmative defenses, it has done nothing to "clearly indicate that the provision ... is intended to enhance the penalty for [murder] when certain characteristics are present." *State v. Smith*, 2005 UT 57, ¶ 11, 122 P.3d 615. We have previously stated that such explicit indication is required, *id.*, and the legislature has had ample opportunity to exempt aggravated murder from the doctrine of merger by amending the statute to clearly indicate that it is intended to operate only as an enhancement provision. "[T]he court has no power to rewrite a statute to make it conform to an intention not expressed." *State v. McCovey*, 803 P.2d 1234, 1240 (Utah 1990) (Durham, J., dissenting) (internal quotation marks omitted). Absent action by the legislature, *Shaffer* and *Wood* are still good law, and the dissent's effort to read section 76-5-202 as an enhancement statute is improper absent clear legislative action.[2]

¶ 65 The aggravating circumstance in this case was the attempted murder. Like the predicate felonies in *Shaffer* and *Wood*, when the aggravating circumstance is a crime, it must merge with the greater offense if no other independent ground exists to raise the charge to aggravated murder.[3] To allow the attempted murder charge to be used as the sole means of aggravation and as its own separate offense permits double counting of the offense in violation of double jeopardy and the merger doctrine.

¶ 66 Mr. Ross could have been convicted of murder and attempted murder. When the jury convicted Mr. Ross for aggravated murder, the attempted murder of Mr. May, a necessary element to prove the aggravated murder, merged with the capital felony. Accordingly, Mr. Ross could be convicted of only aggravated murder.

¶ 67 We affirm the conviction for aggravated murder and vacate the conviction for attempted aggravated murder. The practical effect of this decision is that Mr. Ross will serve one life sentence without the possibility of parole instead of two. *See State v. Hill*, 674 P.2d 96, 98 (Utah 1983) ("[I]t is appropriate to regard the conviction on the lesser offense as mere surplusage, which does not invalidate the conviction and sentence on the greater offense.").

¶ 68 Justice DURRANT and Justice PARRISH concur in Chief Justice DURHAM's opinion.

Parallel Citations

590 Utah Adv. Rep. 10, 2007 UT 89

Footnotes

1 We decided *Shaffer* before we added the third step in the merger analysis in *McCovey.* And in *Wood,* which was decided after *McCovey* but before we further clarified our *McCovey* holding in *Smith,* the question of whether section 76-5-202 was an enhancement statute was not raised as an issue and we, consequently, did not discuss it.

2 In closing arguments, the State said, "[Mr. Ross] doesn't order just [Ms. Christensen] back to that bedroom. He orders Mr. May back to the bedroom as well. He starts them back to the bedroom." Mr. May actually testified that Mr. Ross grabbed Ms. Christensen's arm and pushed her toward the bedroom. After another exchange, Mr. Ross pushed past Mr. May and, again, pushed Ms. Christensen to the bedroom.

3 Although Mr. May said that he heard the shots that killed Ms. Christensen while he was trying to start his car and that "the next thing I noticed I was looking up and there he was right in the doorway," he never testified that "very few seconds" elapsed.

1 In *Wood,* the aggravating circumstance that the murder was heinous and depraved was not treated as a separate aggravating circumstance because "the heinousness and depravity arose directly out of the aggravated sexual assault.... [T]he heinousness and the [sexual assault] were the same factually and should be treated legally for merger purposes as one aggravating circumstance." 868 P.2d at 90.

2 Even absent our precedent, the aggravated murder statute does not evidence a "graduated punishment scale ... indicative of an enhancement statute." *Smith,* 2005 UT 57, ¶ 3, 122 P.3d 615 (internal quotation marks omitted). In *Smith,* the concealed weapon statute at issue listed circumstances in which carrying a concealed weapon could be either a class B misdemeanor, a class A misdemeanor, or a second degree felony. *Id.* ¶ 12. The structure of section 76-5-202 is unlike that at issue in *Smith;* all aggravated murders are capital felonies.

3 *See State v. Young,* 853 P.2d 327, 367 (Utah 1993) (recognizing that a "defendant could be convicted of a crime that might also serve as the basis for an aggravating circumstance if the prosecution did not rely on that crime for proof of the aggravating circumstance," and on that basis holding that the theft conviction did not merge with the first degree murder conviction under Utah Code section 76-5-202).

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Addendum D

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

TROVON DONTA ROSS, Petitioner, vs. STATE OF UTAH, Respondent.	**RULING ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND PETITIONER'S MOTION FOR DEFAULT** Case No. 080700641 Judge Rodney S. Page

COMES NOW the Court on the respondent's motion for summary judgment and the petitioner's motion for default. Having reviewed the moving and responding papers, and the materials submitted in support thereof, determined that a hearing is unnecessary for the Court's rulings, and being fully advised in the premises, the Court GRANTS the respondent's motion for summary judgment and DENIES the petitioner's motion for default.

BACKGROUND

On October 24, 2004, the petitioner filed a petition for post-conviction relief pursuant to the Utah Post-Conviction Remedies Act, Utah Code Ann. §§ 78B-9-101 *et seq.* and Rule 65C of the Utah Rules of Civil Procedure. However, the petitioner did not submit a supporting memorandum detailing the factual basis and legal argument relevant to the claims within his petition. Instead, the petitioner filed a motion for discovery. Subsequently, on November 6, 2008, and following a review of the petitioner's affidavit and application for waiver of fees

submitted concurrent with his petition, the Court found the petitioner indigent and provided him with notice of the initial partial filing fee associated with the filing of his petition. *See* Utah Code Ann. § 78A-2-306(1). The Court also notified the petitioner that it could not proceed with his petition until he paid the assessed initial partial filing fee. *See Id.* at § 78A-2-306(2).

On November 28, 2008, the Court received the petitioner's initial partial filing fee, but still had not received the petitioner's supporting memorandum. Thereafter, on January 5, 2009, the Court again informed the petitioner that it would not proceed in reviewing his petition for frivolity, pursuant to Rule 65C(g) of the Utah Rules of Civil Procedure, until receiving his supporting memorandum. In response, the petitioner filed a second motion for discovery on January 22, 2009. This motion prompted the Court to issue a ruling on January 29, 2009, which denied the petitioner's motions for discovery, finding that such motions were premature under Rule 65C(l) of the Utah Rules of Civil Procedure. On the same day, the Court also entered a finding of deficiency regarding the petitioner's claims and directed him to file an amended statement of facts and supporting memorandum. *See* Utah R. Civ. P. 65C(g)(3). Thereafter, on February 3, 2009, the petitioner filed a memorandum in support of his petition, and on February 11, 2009, the petitioner filed an amended statement of facts regarding his post-conviction claims. Accordingly, the Court reviewed the petition for post-conviction relief and its supporting materials for frivolity, pursuant to Rule 65C(g) of the Utah Rules of Civil Procedure.

On April 9, 2009, the Court issued an order of partial dismissal and requiring respondent's pleading, pursuant to Rule 65C(i) of the Utah Rules of Civil Procedure. Within this order, the Court noted that it had reviewed the petition for post-conviction relief, the amended statement of facts and the petitioner's supporting memorandum, and, without reaching the merits of the petitioner's claims, determined that each of the claims appeared frivolous on their face

with the exception of the petitioner's claims of ineffective assistance of trial and appellate counsel pertaining to an alleged failure to raise the "extreme emotional distress" affirmative defense to aggravated murder set forth in Utah Code Ann. § 76-5-202(4) (2002).[1] Specifically, the Court grouped the petitioner's several claims into four (4) categories: (1) claims of ineffective assistance of trial counsel; (2) claims of prosecutorial misconduct at trial; (3) claims for violation of double jeopardy; and (4) claims of ineffective assistance of appellate counsel. Based on the materials submitted by the petitioner, which included a copy of the Utah Supreme Court ruling on his direct appeal, *see State v. Ross*, 174 P.3d 628 (Utah 2007), the Court found that with the aforementioned exceptions the petitioner's claims clearly appeared frivolous on their face, as the claims were either raised or addressed at trial or on appeal, or could have been but were not raised at trial or on appeal.[2] The Court then directed the respondent to file a responsive pleading to the petitioner's two (2) surviving claims.

Subsequently, on April 23, 2009, the petitioner filed a motion to appoint counsel. The Court denied this motion by written ruling dated April 24, 2009, finding that under the circumstances the motion was premature, as the Post-Conviction Remedies Act contemplates the necessity of an evidentiary hearing before the Court determines whether counsel is necessary for

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[1] In 2009, the Utah State Legislature amended Utah Code Ann. § 76-5-202(4) by deleting subsection (i), which stated in relevant part the affirmative defense: "under the influence of extreme emotional distress for which there is a reasonable explanation or excuse." The current version of the statute provides an affirmative defense based on: "a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances." Utah Code Ann. § 76-5-202(4) (2009). The Court notes that the petitioner's claims at issue pertain to the version of the statute applicable at the time of his trial in 2004. Accordingly, this Ruling's references to § 76-5-202(4) pertain to the 2002 version of the statute, not the statute's 2009 version.

[2] *See* Utah R. Civ. P. 65C(g); *see also* Utah Code Ann. § 78B-9-106(1); *see also Hutchings v. State*, 84 P.3d 1150, 1152-53 (Utah 2003) ("Section [78B-9-106(1)] precludes a petitioner from seeking relief on any ground that was raised or addressed at trial or on appeal or that could have been but was not raised at trial or on appeal. ... Proceedings in all petitions for relief filed under the Post Conviction Remedies Act are governed by *rule 65C of the Utah Rules of Civil Procedure*. Rule 65C contemplates section [78B-9-106] by providing for summary dismissal of claims that have already been addressed by the court. Subparagraph (g)(1) of the rule directs the assigned judge to review the petition, and if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim appears frivolous on its face, the court shall forthwith issue an order dismissing the claim .... Proceedings on the claim shall terminate with the entry of the order of dismissal.") (Emphasis in original) (Internal quotations and citations omitted).

the proper adjudication of a petitioner's claims.[3] The Court, however, granted the petitioner leave to renew his motion to appoint counsel at a more appropriate time in the proceedings.

Then, on July 13, 2009, and following the Court's granting two (2) requests for extensions of time, the respondent served its motion for summary judgment. In its accompanying supporting memorandum, the respondent argued that the petitioner's surviving claim for ineffective assistance of trial counsel is procedurally barred, as the petitioner could have raised the claim on appeal. *See* Utah R. Civ. P. 65C(g); *see also* Utah Code Ann. § 78B-9-106(1)(c). The respondent asserted that because the petitioner's appellate counsel was not the same as his trial counsel and because the trial record was adequate to determine whether his trial counsel was ineffective, the petitioner could have raised the issue of the "extreme emotional distress" affirmative defense on direct appeal. Further, the respondent argued that the petitioner's claim for ineffective assistance of appellate counsel must also fail, as the trial record clearly shows that the petitioner's trial counsel's decision not to raise the affirmative defense was strategic and specifically agreed to by the petitioner. Accordingly, the respondent requested the Court dismiss the petitioner's surviving claims.

On July 28, 2009, the petitioner filed a memorandum in opposition to the respondent's motion for summary judgment. In his opposition, the petitioner asserted that he was never informed of the affirmative defense within Utah Code Ann. § 76-5-202(4), and was told that his mental evaluations would not support the same. Despite the inconsistency of these assertions, the petitioner argued that review of his mental evaluations is necessary to determine whether his trial counsel was ineffective. The petitioner next reasserted the argument that his appellate counsel

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[3] *See* Utah Code Ann. § 78B-9-109; *see also State v. Ford*, 199 P.3d 892, 896 (Utah 2008) ("The Act indicates such appointment should occur at the request of the petitioner, and *where an evidentiary hearing would be required* or the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.") (Emphasis added) (Internal quotations omitted).

was ineffective for failing to raise the issue of his trial counsel's ineffectiveness regarding the affirmative defense. Further, the petitioner averred that the respondent's reliance on the trial record regarding his counsel's strategic decision to not raise the affirmative defense is misplaced. The petitioner asserted that the "extreme emotional distress" affirmative defense discussed by his trial counsel on the record is not the same as that contained in the 2009 version of Utah Code Ann. § 76-5-202(4), which he argued is relevant to the surviving claims within his petition.[4] Accordingly, the petitioner argued that the respondent's motion is unresponsive.

Also on July 28, 2009, the petitioner filed a motion for default regarding the timeliness of the respondent's motion for summary judgment. In his motion, the petitioner argued that the respondent had untimely submitted its motion. The petitioner asserted that the Court's extension of time for the respondent to submit its response to the petitioner's surviving claims ended July 12, 2009. Accordingly, the petitioner averred that because the respondent's motion for summary judgment was not served until July 13, 2009, the respondent's pleading was untimely and must be disregarded.

On August 4, 2009, the respondent filed a memorandum in opposition to the petitioner's motion for default. In its opposition, the respondent argued that the Utah Post-Conviction Remedies Act does not permit judgments by default against the State of Utah, but rather requires

[4] The Court notes that the petitioner's opposing memorandum attempts to confuse the substance of his surviving claims. The petition for post-conviction relief and its supporting memorandum both asserted claims for ineffective assistance of counsel for failing to raise the affirmative defense of "extreme emotional distress". *See* Petition for Post-Conviction Relief of an Illegal Conviction, pg.4, ¶ C; *see also* Memorandum in Support of 65C Petition, pgs. 12, 16-17, 42-43, 49-50. The petitioner's claims for ineffective assistance of counsel regarding this defense are the claims for which the Court required the respondent's pleading, not the alternative manslaughter affirmative defense that the petitioner incorrectly references in his opposing memorandum. *See* Order of Partial Dismissal and Requiring Respondent's Pleading. The Court notes that a petitioner's attempt to reconfigure his claims in an opposing memorandum is generally an impermissible tactic, unless good cause is shown. *See State v. Lafferty*, 175 P.3d 530, 541 (Utah 2007); *see also* Utah R. Civ. P. 65C(c). Here, the Court finds that the petitioner has not demonstrated good cause to reconfigure his petition's surviving claims to pertain to the alternative manslaughter affirmative defense. Indeed, both the trial and appellate court records and the materials submitted by the parties clearly do not support a defense based upon "a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the circumstances." Utah Code Ann. § 76-5-202(4) (2009).

a petitioner to establish a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding. Regardless, however, the respondent asserted that July 12, 2009, was a Sunday and that service of its motion for summary judgment on the following Monday, July 13, 2009, constitutes a timely submission under Rule 6(a) of the Utah Rules of Civil Procedure. Accordingly, the respondent requested the Court deny the petitioner's motion for default.

On August 13, 2009, the respondent filed a request to submit for decision regarding its motion for summary judgment.

ANALYSIS

As a preliminary matter, the Court shall address the merits of the petitioner's motion for default regarding the timeliness of the respondent's motion for summary judgment.

Rule 65C of the Utah Rules of Civil Procedure provides in relevant part:

> "Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, *or within such other period of time as the court may allow*, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b)."

Utah R. Civ. P. 65C(i) (Emphasis added). Further, Rule 6 of the Utah Rules of Civil Procedure provides in relevant part:

> "When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion ... with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order[.]"

Id. at 6(b). Moreover, Rule 6 also provides that:

> "The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event *the period runs*

> *until the end of the next day that is not a Saturday, a Sunday, or a legal holiday.*"

Id. at 6(a) (Emphasis added).

Here, the Court issued its order requiring the respondent's pleading on April 9, 2009. This order directed the respondent to file its response within thirty (30) days of its issuance. Subsequently, on May 15, 2009, the respondent filed a motion for enlargement of time regarding its response based upon a delay in its receipt of the record and transcripts from the petitioner's trial. The Court found good cause in the respondent's motion and granted the same by order dated May 18, 2009. This order extended the time for the respondent's pleading to thirty (30) days after the respondent's receipt of the trial record and transcripts. The respondent received the trial record and transcripts on May 28, 2009. Subsequently, on July 6, 2009, the respondent filed a second motion for enlargement of time regarding its responsive pleading based upon caseload issues. On July 7, 2009, the Court issued an order granting the respondent's second motion for enlargement of time, finding that good cause existed for the same and permitted the respondent until July 12, 2009, to submit its responsive pleadings. Thereafter, the respondent served its motion for summary judgment on Monday, July 13, 2009.

Based on the foregoing timeline, considered in the context of the language of Rules 6 and 65C of the Utah Rules of Civil Procedure, the Court finds that the respondent's service of its motion for summary judgment on Monday, July 13, 2009, was a timely response to the surviving claims within the petition for post-conviction relief. Accordingly, the Court DENIES the petitioner's motion for default.

Having now determined that the respondent's motion for summary judgment was timely submitted, the Court shall address the merits of such motion.

Summary judgment is appropriate only, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). As discussed herein above, the petitioner has raised two (2) claims that survived dismissal for frivolity and the respondent has moved for summary judgment on each of these claims. The Court shall address each of the petitioner's surviving ineffective assistance of counsel claims in turn:

1. **The petitioner has failed to establish a genuine issue of material fact to preclude summary judgment on his claim that trial counsel was ineffective for failing to raise the "extreme emotional distress" affirmative defense to aggravated murder set forth in Utah Code Ann. § 76-5-202(4).**

The Utah Post-Conviction Remedies Act provides that any claims that a petitioner raised or could have raised on direct appeal are procedurally barred. *See* Utah Code Ann. § 78B-9-106(1). "Indeed, 'a petition for post-conviction relief is a collateral attack of a conviction and/or sentence and is not a substitute for direct appellate review.'" *Loose v. State*, 135 P.3d 886, 889 (Utah Ct. App. 2006) (quoting *Myers v. State*, 94 P.3d 211, 214 (Utah 2004)).

Here, the petitioner has argued that his trial counsel was ineffective for failing to raise the affirmative defense to aggravated murder set forth at Utah Code Ann. § 76-5-202(4) regarding "extreme emotional distress". "[I]neffective assistance of [trial] counsel should be raised on [direct] appeal if [1] the trial record is adequate to permit decision of the issue and [2] defendant is represented by counsel other than trial counsel." *State v. Litherland*, 12 P.3d 92, 96 (Utah 2000) (Internal quotations omitted).

In the instant matter, it is undisputed that the petitioner was represented on his direct appeal by counsel other than his trial counsel. Thus, the Court finds that the second factor for

determining whether a claim could have been raised on direct appeal is clearly met with regard to the petitioner's first claim.

Moreover, with regard to the first factor, "[a] party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel." Utah R. App. P. 23B(a). The existence of Rule 23B of the Utah Rules of Appellate Procedure ensures that the petitioner's appellate court would have had a sufficient record to adjudicate any viable claim of ineffective assistance of the petitioner's trial counsel. *See Litherland*, 12 P.3d at 98-99 ("[Where, on direct appeal, defendant raises a claim that trial counsel was ineffective ... defendant bears the burden of assuring the record is adequate. This holding merely clarifies the effect of *rule 23B*. ... Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively.") (Emphasis in original). Indeed, in this matter the petitioner raised claims of ineffective assistance of trial counsel on his direct appeal. *See Ross*, 174 P.3d at 638-640. Thus, the Court finds that the first requirement for determining whether a claim could have been raised on direct appeal is also clearly met with regard to the petitioner's first claim.

The Court, therefore, finds that the petitioner could have brought his claim of ineffective assistance of trial counsel regarding his counsel's failure to raise the affirmative defense of "extreme emotional distress" on direct appeal. Accordingly, the Court must GRANT the respondent's motion for summary judgment on the petitioner's first claim, as such claim is procedurally barred as a matter of law by Utah Code Ann. § 78B-9-106(1)(c) and Rule 65C(g)(1) of the Utah Rules of Civil Procedure.

However, the Utah Post-Conviction Remedies Act provides that an individual may seek relief on the basis that a claim could have been but was not raised at trial or on appeal "if the failure to raise that ground was due to ineffective assistance of counsel." Utah Code Ann. § 78B-9-106(3). Accordingly, for this exception to the procedural bar to apply, the petitioner must demonstrate that the failure to raise a claim on direct appeal was due to the ineffective assistance of appellate counsel. *See Lafferty*, 175 P.3d at 540-42. This leads the Court to consider the petitioner's second claim, which relates to an alleged ineffective assistance of the petitioner's appellate counsel for failing to raise issue with regard to the effectiveness of the petitioner's trial counsel for not presenting the "extreme emotional distress" affirmative defense.

2. The petitioner has failed to establish a genuine issue of material fact to preclude summary judgment on his claim that appellate counsel was ineffective for failing to raise issue with the effectiveness of trial counsel with regard to the "extreme emotional distress" affirmative defense to aggravated murder set forth in Utah Code Ann. § 76-5-202(4).

To demonstrate ineffective assistance of appellate counsel, a petitioner must establish: (1) his attorneys' performance was deficient and (2) the deficient performance prejudiced his case. *See Strickland v. Washington*, 466 U.S. 668 (1984). Given these requirements, the Utah Supreme Court has indicated that, "[a] post-conviction petitioner can show that his appellate counsel was ineffective by showing that appellate counsel prejudiced his case by omitting a claim that is a dead-bang-winner." *Taylor v. State*, 156 P.3d 739, 746 (Utah 2007) (Internal quotations omitted). "This requires the petitioner to show that appellate counsel *[1] omitted an issue which is obvious from the trial record and [2] one which probably would have resulted in reversal on appeal*." *Id.* (Internal quotations omitted) (Emphasis added).

Here, the petitioner has argued that his appellate counsel was ineffective for failing to raise issue with his trial counsel's effectiveness regarding the "extreme emotional distress"

affirmative defense. While the petitioner has correctly framed his argument as a claim of ineffective assistance of appellate counsel, thus avoiding the procedural bar of the Post-Conviction Remedies Act, his argument ignores controlling case law regarding ineffective assistance of counsel and the clear trial record in this matter.

First, under the standard set for by the Utah Supreme Court in *Taylor*, any claim that the petitioner's trial counsel was ineffective for failing to raise the "extreme emotional distress" affirmative defense, must be obvious from the trial record. *See* 156 P.3d at 746; *see also Lafferty*, 175 P.3d at 539. In this regard, it is noteworthy that, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. A petitioner must "rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy." *Litherland*, 12 P.3d at 99 (Internal quotations omitted). "Court[s] will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect." *State v. Tennyson*, 850 P.2d 461, 465 (Utah Ct App 1993).

Here, the trial record conclusively demonstrates that the petitioner's trial counsel's decision not to raise the "extreme emotional distress" affirmative defense was not only strategic, but was specifically agreed to by the petitioner. On November 8, 2004, after closing arguments in the petitioner's trial, and with the jury in deliberation, the Court held a conference in chambers with counsel and the petitioner present. *See* Reporter's Transcript, Proceedings (In Chambers), Trial Volume 5 of 6 (Nov. 8, 2004). During this conference, the petitioner's counsel explained that he did not present the "extreme emotional distress" affirmative defense as part of his trial strategy due to evidentiary problems known to himself and the petitioner. *Id.* at pg. 20, ln. 6-25; pg. 21, ln. 1-23. Specifically, the petitioner's trial counsel stated:

"There is, your honor, and -- and it's a matter I think should be put on the record.

Mr. Ross and I have talked about this, but as to the matter of strategy that was in this case -- and I think it's important maybe for later on down the road.

Basically, Mr. -- Mr. -- when I represented -- started representing Mr. Ross we spoke -- I spoke with the county attorney and there was an offer made. If Mr. Ross would plead guilty, he would receive life without parole. Mr. Ross and I discussed that. It was his decision that he did not want life without parole, that -- that he, in fact, desired the death penalty.

And I instructed him at that point that even if he pled guilty -- and there was a question of whether or not there could be an admission -- evidence problems in taking that guilty plea of Mr. Ross -- giving that guilty plea.

But in the event the guilty plea was accepted, I explained to him that there would still be the necessity of a hearing, a sentencing hearing, that the judge can not impose the death penalty without that hearing.

And I advised him, Mr. Ross, that if that was his position then it was to his benefit to have a trial because, basically, the same evidence would be introduced at the sentencing hearing as a trial. And if he had the trial, that would keep his options open, not only for possible appeal down the road, but also for his testimony at the penalty phase of the hearing.

I think the court can question Mr. Ross, but Mr. Ross was in agreement with that strategy. I think we followed through with that strategy. There was no manslaughter defense raised based on any extreme emotional disturbance because of – because of evidentiary problems as are known to Mr. Ross and myself.

But anyway, that strategy has been followed and I think if there is a penalty phase, Mr. Ross will testify. And I think once that happens, what he testifies to is revealed, I think we'll -- we'll show the -- the reasonableness of that strategy. And so I just wanted to put that on the record in case down the road, who knows what will happen.

But anyway, that's the reason I've done what I've done. I think Mr. Ross -- he and I have talked about this a lot, on numerous occasions, and I think he agrees with that strategy. So I'd like to put that on the record."

Id. (Emphasis added). Following these statements, the Court inquired with the petitioner as to whether the referenced conversations and trial strategy decisions were discussed and agreed to. *Id.* at pg. 21, ln. 24-25; pg. 22, ln. 1. To this inquiry, the petitioner responded: "*Yes, your honor.*" *Id.* at pg. 22, ln. 2 (Emphasis added).

Given the statements of the petitioner's trial counsel and the petitioner within the trial record regarding the strategic decision not to raise the "extreme emotional distress" affirmative defense, and the strong presumption given to trial strategies, the Court finds that a claim for ineffective assistance of trial counsel based upon the failure of counsel to raise the affirmative defense would not have been obvious from the trial record at the petitioner's direct appeal. Accordingly, the Court finds that the petitioner cannot satisfy the first prong of his ineffective assistance of appellate counsel claim.

Moreover, because the petitioner's trial counsel's decision to not raise the affirmative defense was strategic, the petitioner must set forth facts and argument to rebut the strong presumption of effectiveness regarding this decision to satisfy the second prong of his ineffective assistance of appellate counsel claim, i.e. that the claim probably would have resulted in reversal on appeal. *See Taylor*, 156 P.3d at 746; *see also Lafferty*, 175 P.3d at 539. In reviewing the pleadings and supporting materials submitted by the petitioner, the Court finds that the petitioner has not met his burden with respect to this second prong. This is not the case of the failure to raise a "dead-bang-winner."

Accordingly, in failing to establish his trial counsel's ineffectiveness, the petitioner has not established such obvious error, as is required under *Taylor* and *Lafferty* to render his appellate counsel's failure to raise such issue on appeal constitutionally ineffective. *See* 156 P.3d at 746; *see also* 175 P.3d at 539 "Proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *State v. Penman*, 964 P.2d 1157, 1162 (Utah Ct. App. 1998) (citing *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993)). Therefore, because the petitioner has not met his burden of establishing his ineffective assistance of

appellate counsel claim, the Court must GRANT the respondent's motion for summary judgment on the petitioner's second claim.

CONCLUSION

Based upon a careful consideration of all the pleadings in this case, and the materials submitted in support thereof, the Court finds that the petitioner has failed to "set forth specific facts showing that there is a genuine issue for trial" with respect to each of the claims he raises. *See* Utah R. Civ. P. 56(e). Accordingly, the Court finds that the respondent is entitled to summary judgment on each of the petitioner's claims as a matter of law. The Court, therefore, GRANTS the respondent's motion for summary judgment and shall dismiss the petitioner's petition for post-conviction relief. Further, and as discussed herein above, the Court DENIES the petitioner's motion for default.

Pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, the Court directs the respondent to prepare an appropriate order that is consistent with and reflects this Ruling.

Date signed: Oct. 7, 2009.

Rodney S. Page

DISTRICT COURT JUDGE
RODNEY S. PAGE

DISTRICT COURT, SECOND JUDICIAL DISTRICT
STATE OF UTAH

Addendum E

P.O. Box 250
Draper, UT 84020

IN SECOND DISTRICT COURT OF UTAH
DAVIS COUNTY

Trevon Dana Rosi,
Petitioner, pro se,
v.
State of Utah
Respondents.

Memorandum in Response to State's Motion for Summary Judgment; Request for Discovery.
Case 080700641
Judge Rodney S. Page

This memorandum is filed pursuant to this courts order allowing the timely consideration of the States untimely filing of the Motion for Summary Judgment, if the court so orders.

If the court strikes the untimely Motion for Summary Judgment, this Memorandum is moot, by Rule 65C, and Rule 5, U.R.Civ.P.

Respondents Motion for Summary Judgment is based upon (2) two theories; First, that his claim of Affirmative defense is procedurally barred, could have been raised on appeal, and

Second, that appellate counsel was not ineffective because the record refutes the claim.

Then Respondents claim Petitioner had agreed on the record to a trial strategy that excluded the affirmative defense.

Factual History

The record reflects that Petitioner did agree to not raise a "manslaughter defense based on any extreme emotional disturbance" because counsel had inferred that the mental evaluations were holding him of sound mind, and that the evidence of the case precluded raising that defense. (See Record in Monroe) p. 10.

However, Respondents are completely off point here: manslaughter and its "Emotional disturbance defense" is not what was claimed, nor held by the order below, or Petitioner.

What was held to be the issue was 76-5-202-3-a-i, "under the influence of extreme emotional distress for which there is a reasonable explanation or excuse."

Analysis and Discussion

The "manslaughter defense"

Appear to be relying on is Utah Code 76-5-205(c), which refers to 76-5-205.5 and is defined there as "a delusion attributable to a mental illness"...

AS TO TRIAL COUNSEL

Petitioner was never informed he could claim this defense, and was told the mental evaluations would not support it.

However, this is an issue previously raised: do the mental evaluations say Petitioner was competent, or do they say he was under delusion attributable to a mental illness?

That is why the Discovery Motion was previously filed, and should now be re-addressed by the court.

Until those records can be reviewed, Petitioner asserts that condition was not met as was told him by his counsel; but he wants to know the actual facts found by the evaluators.

Because the State raises this as a possible defense, claiming it not proper, Petitioner wonders if it did apply and his counsel also failed to tell him.

Therefore, this information needs to be

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provided Petitioner so this issue can be at best properly addressed by this Court, especially since it is defense counsel that is being claimed ineffective.

AS TO APPELATE COUNSEL

Appellate counsel, because the manslaughter defense was not offered by defense counsel, apparently also assumed the other "Affirmative Defense" did not apply – in that she was ineffective, as ruled non-frivolous by this Court.

Appellate counsel should have visited that issue on her own to see if any other mistakes were made, in addition to what she prevailed on in the Utah Supreme Court.

Her failure to do so was a mistake, albeit an error that has direct bearing here; she was two the cause of the "Trip to Annies" was her refusal to answer Petitioners call back following her call. (Discussed in Petition Memorandum at length.)

Therefore the States assertion she was not ineffective must fail, as the record does not support the Affirmative Defense to 76-5-202, [illegible] manslaughter

defense that appears on the record verbatim ... "extreme emotional disturbance".

These are two entirely different issues, with entirely different standards and elements, so both should have been scrutinized by appellate counsel since it does appear on the record.

The State further admits Petitioner refused to challenge the strategy to use the manslaughter mental defect or disturbance defense, and their attempt to distract the court is lame, and borders on bad faith.

Conclusion

Utah Code 76-5-202-(3)-(a) is an affirmative defense that both trial and appellate counsel failed to raise in their respective venues, so this issue is shown factual by the very record the State presents as its argument against the claim: The "Affirmative Defense" was never raised, so Summary Judgment cannot issue in the States favor as they have failed to meet their burden of proof.

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Petitioner prevails on this claim because both

1) Counsel omitted an issue which is obvious from the trial record and 2) one which would have resulted in reversal on appeal"; meeting both standards cited in Taylor v. State, 156 P3d 739 (Utah 2007).

"There was no conceivable tactic or strategy that can be surmised from counsel's acts".
State v. Tennyson, 850 P2d 461 (Utah App. 1993).

In spite of the record, both counsels refused to raise the defense, so it cannot be claimed a strategic decision because it does not appear on the record at all, as the state claims. This makes it probable that the Appellate Court would deem it ineffective on appeal, if it was raised there.

The Motion for Summary Judgment must fail for failing to meet the burden of proof, "That no facts exist upon which Petitioner can state a claim" for relief.

The record supports Petitioner, and the State has failed to deny that the affirmative defense listed in 76-5-202-3(a) does not apply - so they have admitted it does apply pursuant to U.R.Civ.P. 8(d).

Lastly, United States Supreme Court Holbrook Co. v.

Adams, 542 P2d 191 (Utah 1975) states, "it only takes one sworn statement to dispute averments on other side of controversy and create issues of fact, precluding summary judgement."

The state has not met this burden; and Petitioner has sworn counsels both failed to show they raised or waived this issue on the record, and the record admittedly shows that claim factual.

"It is only necessary for non-moving party to show facts controverting the facts alleged in moving parties affidavit." S.L.C. v. James Construction, Inc., 761 P2d 42 (Utah App. 1988).

Plaintiff has met his burden under S.L.C. v. James Construction; and the movant (state) has not filed an affidavit either, so both prongs have been met by Petitioner here.

Therefore, Summary Judgment Motion fails, and the court should proceed to set Discovery and Hearing Schedules.

Respectfully Submitted,

X

July 16, 2009

Certificate of Service

I certify I mailed a copy of this document to Utah Attorney General this 23rd day of July, 2009 at 160 E. 300 S. 6th fl. SLC, UT 84114.

Addendum F

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

TROVON DONTA ROSS, Petitioner, vs. STATE OF UTAH, Respondent.	**RULING ON PETITIONER'S MOTION TO APPOINT COUNSEL** Case No. 080700641 Judge Rodney S. Page

COMES NOW the Court and having reviewed the petitioner's motion to appoint counsel and being fully advised in the premises rules as follows:

BACKGROUND

On October 24, 2004, the petitioner filed a petition for post-conviction relief and affidavit and application for waiver of court fees. Concurrent therewith, the petitioner filed a motion for appointment of counsel. Subsequently, on November 6, 2008, the Court reviewed the petitioner's affidavit and application for waiver of court fees and found the petitioner indigent and provided him with notice, pursuant to Utah Code Ann. §78A-2-306, of the initial partial filing fee associated with the filing of his petition. Thereafter, the petitioner paid the initial partial filing fee and submitted an amended statement of facts and memorandum in support of his petition.

On April 9, 2009, and following the Court's preliminary review of the petition and supporting materials, pursuant to Rule 65C(g) of the Utah Rules of Civil Procedure, the Court issues an order of partial dismissal and requiring respondent's pleading.

On April 23, 2009, the petitioner renewed his request for appointment of counsel by filing the instant motion to appoint counsel. The petitioner's basis for the instant motion is the Court's order requiring the respondent's pleading.

ANALYSIS

The Utah Post-Conviction Remedies Act sets forth the rules that govern petitions for post-conviction relief. *See* Utah Code Ann. §78B-9-101 *et seq.*; *see also* Utah R. Civ. P. 65C(a). Specifically, Utah Code Ann. §78B-9-109 establishes when pro bono counsel may be appointed in post-conviction matters, to wit:

> "If any portion of the petition is not summarily dismissed, the court *may*, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal."

Utah Code Ann. §78B-9-109(1) (Emphasis added); *see also State v. Ford*, 199 P.3d 892, 896 (Utah 2008). "The Act indicates such appointment should occur at the request of the petitioner, and *where an evidentiary hearing would be required or the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication*." *Ford*, 199 P.3d at 896 (Emphasis added) (Internal quotations omitted); *see also* Utah Code Ann. §78B-9-109(2).

In the instant matter, as the respondent has not yet submitted a responsive pleading that addresses the petitioner's surviving claims, the Court has not determined whether an evidentiary hearing is necessary. Further, the Court summarily dismissed the majority of the petitioner's claims without reviewing the merits of the petitioner's surviving claims; thus, the complexity of

the petitioner's remaining claims and the need for the appointment of counsel for the proper adjudication of such claims is uncertain at this time.

Accordingly, at this point in the proceedings, the Court finds the petitioner's motion to appoint counsel premature.[1] The Court therefore DENIES the petitioner's motion to appoint counsel.

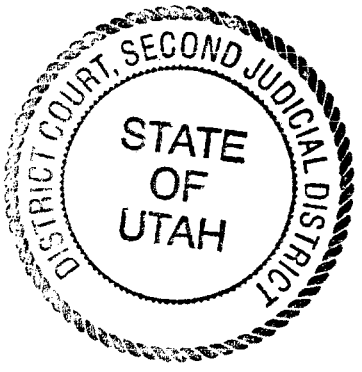
CONCLUSION

For the aforementioned reasons, the Court DENIES the petitioner's motion to appoint counsel. However, the Court grants the petitioner leave to renew his motion to appoint counsel at the proper time in the proceedings. This ruling shall also constitute the Court's order in this matter; no separate order is required.

Date signed: April 24, 2009

Rodney S. Page

DISTRICT COURT JUDGE
RODNEY S. PAGE



[1] This is not to say that at some later point in the proceedings the Court would be unwilling to order the appointment of pro bono counsel. The petitioner may certainly renew his motion to appoint counsel at a more appropriate time, such as, if and when the Court determines that an evidentiary hearing on his petition for post-conviction relief is necessary following the submission of the respondent's pleading.